THE PRACTICE AND PROCEDURE FOR COMPANY LIQUIDATION IN NIGERIA UNDER THE COMPANIES AND ALLIED MATTERS ACT, 1990.

BY

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D E C L A R A T I O N

I hereby declare that this thesis has been written by me and that it is a record of my own research work. It has not been presented in any previous applications for a higher degree.

All quotations and references are indicated with specific acknowledgements.



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CERTIFICATION

This thesis entitled "THE PRACTICE AND PROCEDURE FOR COMPANY LIQUIDATION IN NIGERIA UNDER THE COMPANIES AND ALLIED MATTERS ACT, 1990" by AKUME, ANDREWS Esq meets the regulations governing the degree of Master of Laws of Ahmadu Bello University, Zaria and is approved for its contribution to academic knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to the Department of Commercial Law. Its cream of talented, dedicated and ingenious Faculty, gave me motivation throughout the compilation of this research.

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Mrs. Abigail A. Oyewale of Private Law Department, Ahmadu Bello University, Zaria typed this work. To her I'm grateful for the meticulous and clean typing.

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ABSTRACT

Incorporated companies are a bye product of the evol evolution of capitalist economies where the main objective is profit maximisation. The owners of these companies enjoy some legal privilages which include limited liability up to only the amount of shares they had subscribed to, but had not fully paid up for (if any), separate legal personality for the company different and aside from that of its owners, perpetual succession etc. These companies, like the pro proverbial goose, continue to produce profits for its owners in perpetuity until some unforseen or unfavourable economic or social problem develops that makes the company not to function properly. When such discomfort occurs, the company is said to be distressed and the distress must be tackled urgently and decisively if the company must survive.

Schemes of arrangements such as arrangements and compromise, mergers and takeovers, receiverships etc may be employed to revive an ailing company. These schemes sometimes succeed, sometimes they fail to produce the desired results, and where they fail, liquidation may becomes inevitable.

The members, creditors or other persons who have a stake in the company or other concerned persons who have an ailing company on band that does not respond to the schemes of arrangement employed to revive it may now decide what type of liquidation process to adopt in winding up the company. Three options are open to them: compulsory liquidation by court order, voluntary liquidation by members or creditors of the company and liquidation under court supervision. By whichever process the company is liquidated, the ultimate aim is to collect the assets of the company, pay off the cost of the liquidation and settle the creditors. If any thing is left over from settling the cost of the winding up i.e. if further fund3 are left over, then the contributaries are settled and sometimes the employees too are settled; if there is a provision to that effect.

Liquidation is a drastic measure. It brings the life of a company to an end but does not guatantee that those who have a stake therein will get any thing out of it, depending on whether or not there are enough assets to meet the claims of all those legitimately entitled thereto.

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All E. R.	-	All England Reports
A.C.	-	Appeal Cases
ALR Comm. Series	-	African Law Reports Commercial Series.
CAP.	-	Chapter
C.A.	-	Court of Appeal
Ch.	-	Chancery Reports
Ch.D.	-	Chancery Division
Ch, C.A.	-	Chancery Court of Appeal
Ch. App.	-	Chancery Appeal
F.H.C.	-	Federal High Court.
FHCR	-	Federal High Court Reports
FRC	-	Federal Revenue Court
KB	-	King's Bench.
L R Ch.	-	Law Reports, Chancery Appeals.
L. T.	-	The Law Times Reports
NWLR	-	Nigerian Weekly Law Reports
Q. B.	-	Queens Bench.
S. C.	-	Supreme Court
T L R	-	Times Law Reports
W L R	-	Weekly Law Reports.

CHAPTER ONE

GENERAL INTRODUCTION

Under the Nigerian Legal System, an investor has an option of three types of business organisational frame works within which to invest his money. These include, the sole proprietorship (sole trader), partnership and the incorporated company. Since this work is a research into the law and practice of company liquidation, the use of the word "company" will be restricted to mean the incorporated company under The Companies and Allied Matters Act, 1990. However, before we proceed, it might be pertinent to find out, what does the term "company" mean ?

There is strictly speaking no definite Legal definition of the word 'company'. The word is rather used generally to refer to an association of persons carrying on business under a corporate name either for profit or for charitable purposes, and in some cases the word also extends to cover an association of persons, (even though unincorporated) who carry on business together under a firm name as in the case of partnerships.[1] However Section 650(1) of the Companies and Allied Matters Act 1990 defines a company as -

> "... a company formed and registered under this Decree or as the case may be, formed and registered in Nigeria before and in existence on the commencement of this Decree".

This definition does not help matters as it does not tell us what a company actually means, at best, the definition only gives us an idea of the type of company the law has in mind when it makes reference to the word "company". Nevertheless for the purpose of this work, the definition in S. 550(1) of the Act becomes relevant because essentially only a company incorporated under the Act can undergo the process of liquidation as contemplated by the Act; except also the unregistered company mentioned in Section 532. For the purpose of laying a foundation for this research, a working, definition will be attempted for the word Company.

In ordinary commercial sense, a company is an incorporated association, collection or succession of persons having in law an existence, rights and duties under a corporate name, separate and distinct from those of the persons who are from time to time its members, the purpose of such association being profit making or charity as the case may be.

A company could either be private or public. A private company is one which is owned by a maximum of 50 persons as prescribed by Section 22 of the Act and its shares are restricted from public offer or transfer. A public company on the other hand is one which has no restriction on the number of its members or on the public offer or transfer of its shares.

On the whole, the incorporated company is the most viable and important unit of investment in modern times because of the advantages associated with it. These advantages include separate legal personality for the company distinct from its owners or members and officers or organs, so that the company can own property in its corporate name, sue and be sued, and also has perpetual succession, so that the company continues in existence independent of the life span of its members, officers or organs.

Despite the above conceptual niceties associated with incorporation, a company may, when faced with adverse economic situations contract and if those adverse effects are not dealt with, the company may fail and therefore be liquidated by the due processes provided for in part XV of the Companies and Allied Matters Act, 1990.

However, before the option of winding up is contemplated, the Act makes adequate provisions for reviving an ailing company through the schemes of arrangements provided in part xvi (16) Section 537 - 540 or other reconstructive schemes like mergers and acquisitions or take overs provided for in chapter 4 of part xvii of the Act. Where the utilisation of these revival schemes fail to achieve the set objectives of reviving the company, winding up thus becomes inevitable and thereby the life of the company is brought to an end.

It should be noted that before a company fails, to the extent that it becomes inevitable to wind it up, it must have manifested some symptoms that could be diagnosed as evidences of an imminent collapse. The concept of corporate collapse or what is popularly called corporate failure became noticeable or recognised as far back as 1720 in England prior to the advent of incorporation in 1844. At that time partnership type of companies were formed by what was then refered to as the elaborate deed of settlement which was an agreement that regulated the business relationship of members of the partnership and also provided for the holding of shares by members in the partnership.[2] This arrangement was the beginning of the march towards incorporation as a form of corporate

investment. Many of these partnership-like companies failed and a select committee was set up to study the situation. Based on their recommendations, the Bubbles Act of 1720 was enacted which was intended to deal with the situation. The majority of companies formed during this period failed too quickly and as such were likened to a "bubble" which formed and burst almost as soon as it was formed. Thus companies that failed were refered to as bubble companies. The situation continued up to 1825 when a new Bubble Companies Act was enacted which granted charters to incorporated companies with certain measure of limited liability.

The important thing to note is that between 1720 and 1844 when incorporation was fully recognised and granted to companies the causes of the failure of bubble companies were identified as faulty or unsound business calculations, fraudulent objects or that their objects were so ill constituted as would render them most probable to fail. Despite the antiquity in the dates of the above findings it is submitted that they still remain valid today.

The most recent data on the causes of corporate failure lie in the survey carried out in 1973 by Dun and Bradstreet, a firm of financial management experts in the U.S.A. who in

their survey of corporate failure in the United States of America revealed various causes of failure among which management inexperience ranked first.
There are other major researches like that of John Argenti[3] and so many others, some of whose work will be articulated in the main body of this text.

It should be noted that once these symptoms or corporate failure are not dealt with as effectively as they manifest, the inevitable consequence is to liquidate the company. The Companies and Allied Matters Act 1990 provides elaborate procedures for the winding up of a failing company. These include a choice among three modes of winding up, winding up by court order, winding up voluntarily or winding up under court supervision.

By whichever of the three modes, a company is would up, the assets will be applied to settle its liabilities, after which the shareholders are settled and the company is struck off the register of companies, thereby bringing the company's life to an end.

1.1 OBJECTIVES OF THE WORK.

Corporate failure in Nigeria has now become a phenomenon. Since the introduction of the structural adjustment programme in 1986, tough fiscal measures have been adopted by successive regimes to revamp the Nigerian economy. This has led to an unprecedented decline of several businesses, which have had to be liquidated by the due process of law as provided for in the Companies and Allied Matters Act, 1990.

In this regard, there is the need to examine the concept of corporate failure itself to discover what the causes are and the schemes that could be legally adopted to prevent or avoid a collapse, and where it becomes inevitable, there is the need to examine the procedures by which such a failing company could be liquidated or wound up successfully so that all the parties involved are compensated or settled accordingly.

It is with the above ideals in mind that this research has been embarked upon.

It is also to examine this concept of corporate collapse from a business as well as legal perspective so as to produce a material that is a hybrid and a reflection of the thoughts and desires of both the legal as well as the business mind, so that it could be beneficial to, both the lawyer, the

business man and any other person interested in the subject.

I acknowledge that there are other authoritative texts that have also touched on the subject either directly or otherwise, such as Deji Sasegbon's volumenous series on Company Law and practice in Nigeria[4] and J. Olakunle Orojo's Company Law and practice in Nigeria,[5] however it is submitted that these texts have dealt with the issues in a traditionally legal perspective, hence the need for a material like this which aside from looking at the issue from a legal point, has also articulated the view point of the business community which includes the economists and financial management experts.

1.2 SCOPE OF THE RESEARCH.

This work is essentially intended to articulate the practice and procedure for company liquidation under the Companies and Allied Matters Act, 1990. In this regard, the procedures prescribed in the said Act shall be examined. Further-more, in order to achieve the already stated objectives, a chapter has been included which examines the concept of corporate collapse from the perspective of the legal practitioner and that of the business man or economist.

In that chapter, much of the views of the economists and other financial management experts have been articulated. For the purpose of examining the effects of governmental interventions by way of fiscal economic measures on the corporate environment or climate, a little exegesis has been included in chapter two to show how governmental policies have contributed to the collapse of companies in Nigeria and for this purpose, the period between 1983 and 1992, a span of nine years was chosen. During this period, a series of very harsh fiscal policies were implemented by the government for the first time after over one decade of oil boom, with the aim of restoring the prosperity that attended the oil boom era.

Furthermore, the materials available for proving the hypothesis that harsh government policies also help to "Kill" corporate investment were current up to 1992 only. All my visits to public libraries, the National archives, Government Printers etc could not fetch me any materials more current than 1992. Besides, this research was conducted and concluded in 1994, and as at this date materials up to 1992 could authoritatively be said to be recent.

Since this research also has the underlying interest to contribute to learning and research, academic arguements have been originated and discussed in the course of the work in order to analysis the law to see whether it is adequate or not, so as to ground a basis for my conclusions and recommendations at the end of the work.

1.3 ORGANISATIONAL LAY OUT.

This work is broken down into six chapters which have been presented in the following orders-

Chapter One is the introductory part of the thesis. It introduces the research and briefly outlines the framework upon which the thesis is founded i.e. the objectives, scope, organisational layout and research methodology.

Chapter Two deals with the phenomenon of corporate collapse. The issues considered here are the legal and economic perspective to the subject. The latent and manifest causes have been discussed with the possible remedies.

Chapter Three examines the nature and substance of winding up by the court and the legal procedures involved.

Chapter Four looks at voluntary winding up and winding up under court supervision, examining their nature and substance and the legal procedure involved.

Chapter Five discusses the philosophical basis for winding up as a creditor and investor protection. Winding up here is discussed in the light of its being used as a protection for the creditor and investor where their interests are irredeemably under jeopardy.

Chapter Six is the concluding chapter and therein, the summary, conclusions and recommendations are articulated.

1.4 DEFINITION OF TERMS

Unless otherwise stated, references to the phrase "the Act" means the Companies and Allied Matters Act, 1990 Laws of the Federation Cap. 59.

References to the word "company", also as already stated means the registered or incorporated company under the meaning confered by Section 650(1) of the Act.

"Winding up" shall also be used interchangeably to mean the same thing as "liquidation".

NOTES AND REFERENCES TO CHAPTER ONE

1. S. 19(1) & (2) Companies and Allied Matters Act Laws of the Federation Cap 59 of 1990.

2. Charlesworth & Cains Company Law, 12th Ed. London Stevens & Sons 1983 at p.6.

3. The findings of John Argenti are enumerated in his book "Corporate Collapse" published in 1976. The said findings have been extensively discussed in Farrar's Company Law 2nd Ed. Butterworths, London at pp. 558 - 559.

4. Deji Sasegbon: Nigerian Companies and Allied Matters Law and Practice, DSC Publishing Ltd Lagos, 1991 Edition.

5. J. Olakunle Orojo, Company Law and Practice in Nigeria, 3rd Ed. Mbeyi & Associates, Ltd., Lagos 1992.

CHAPTER TWO

THE PHENOMENON OF CORPORATE COLLAPSE.

INTRODUCTION

As earlier noted in the introductory chapter to this work, The Incorporated Company is one of the three forms of business organisations through which a business man may wish to invest his money. The other two being the sole trader and the partnership.

Companies are formed for the purposes of enjoying the benefits that go with Incorporation. These benefits include a separate legal identity for the company, distinct from that of its owners, perpetual succession so that the company outlives it's members or owners and officers, etc. As a result of the above, the company can act through it's corporate name, sue and be sued, own property, employ staff to carryout its objects and the members enjoy limited liability in the company if the company is one with limited liability so that their liability to the company is limited only to the amount of shares held but unpaid by them. From the foregoing, it is clear that companies, normally are not formed with the intent that they should fail, rather they are intend to continue in perpetual succession

and with the same perpetuity produce profit for its owners as and whenever possible. The reference to the word "Company" in the course of this discourse will be restricted to the limited liability company which is formed for profit, also for the purpose of incorporating the ideas and philosophies of the Economists and financial management experts in this area of the phenomena of corporate collapse which it is submitted is of interest to both the Lawyer and Economist or allied experts alike, the use of the word "company" will further be employed interchangeably with the word "firm".

This is necessary because to the Economist, the slavish use of the word "company" only amounts to mere Legalism. They therefore prefer to refer to a company and indeed all other forms of business organisations as firms. The intent for this usage being to portray these organisations more as units for producing profits than their legal composition.

As noted earlier on, firms are not formed normally with the intent that they should fail, rather they are intended to continue in perpetuity to produce profits for its owners.

However despite this ideals, the fact is that companies or firms do contract and eventually fail, if the contraction is not controlled. When a Company fails and several others also fail so that it becomes a precedent and no longer an anomally that a company should fail, this becomes a phenomena which I refer to as, or what I call corporate collapse or failure.

The causes of corporate collapse or business failure as the Economists may prefer to call it, are a very complex area of study as the causes of failure range from the visible to the invisible. The complexity exists b cause the phenomena of corporate failure itself is inadequately studied.[1] This is largely because the causes of corporate failure are only known when a company that has failed is examined as a case-study. It is now known that each such Company that has failed reveal peculiar problems which may not be applicable to another similar company given similar conditions or circumstances. The situation is further worsened as Farrar[2] properly puts it when most professionals involved in the Liquidation proceedings when confronted with the different and peculiar causative factors for Corporate failure, usually come out with their own views based on their own diverse peculiar individual experiences and therefore there is little or no consensus at all on the

Before a company reaches a state where it is refered to as having collapsed, it must have manifested some symptoms which are indicative of an ailing company. These indicative symptoms like the causes of collapse are themselves not conclusive nor of general application as they vary from Company to Company given peculiar circumstances.

2.1 PREDICTION OF POSSIBLE BUSINESS FAILURE.

The issue of predicting business failure lies deep within the disclosure philosophy of the Companies and Allied Matters Act.[4] Investors and creditors alike should be able to predict whether a company is viable or likely to fail or whether the company is in distress or is buoyant. This is to afford them free violation in choosing where and when to invest or advance credit and this can only be done when all the facts are laid before them.

One of these disclosure requirement is the one requiring public companies to publish their statements of trading profit and loss accounts. Section 345 to 354 of the Act, imposes a statutory duty on the Company Management to publish their Balance Sheet so that prospective investors or creditors may see and know the Financial or Asset base of the company

before deciding whether to invest or advance credit to it. It is hoped that investors and creditors alike will be able, from the Company's balance sheet, to predict the Factual financial position of the company as to know whether it is really healthy or ailing. However, the balance sheet is a meee mask, it does not tell the real position of the Company financially as these intricases require Accounting prowess to unravel.

How then may a prospective Investor or Creditor be able to predict with near-precision if a particular Company is healthy or not , Since the balance sheet (statement of financial standing of the Company) may not be sufficient? This is an all important question because if corporate failure can be predicted, it can very well be prevented, and it will help the investors and creditors to avoid those companies that are not viable so that they don't invest in such companies where their monies will be trapped, with no hope of repayment.

Just as the balance sheet requires more than just casual analysis of the arithmetical figures reflected on the sheet, to understand its real implications regarding the health of the Companies concerned, the issue of predicting

symptoms of Corporate failure is even more intricate as it requires deep knowledge of Accounting or expertise in financial management to discern.

Financial experts have over the years at various times researched and come out with various predictive symptoms that point to a possible or impending failure. These symptoms were arrived at by analysing various formulas or what is refered to as financial ratios in Economic terms, although these Formulas or Financial ratio analysis have not helped matters as they require expert knowledge of Accounting to be made use of, they are nevertheless acceptable scientific methods of predicting symptoms of distress, depicting an ailing company. It would therefore serve some informative purpose to mention or discuss two of such predictive ratios or formulas.

BEAVER'S STUDIES:

William Beaver, a Financial expert, was the first to use financial ratios or what we may call statistical techniques to predict symptoms of corporate failure based on a 5 year comparative analysis of some companies that failed and some that survived or prospered during those chosen five years of his studies. His findings were based on a formulation of Mathematical and statistical data

which he used in formulating multi-variate determinants of corporate failure. These formulas are beyond the scope of this work for us to delve into considering them in their intricate mathematical form, however, it is only pertinent to note that Beaver broadly summarised his findings that the general symptom of an ailing Company is her inability to meet financial obligations of any type.[5]

Although appreciative of Beavers analysis and efforts as a pioneer researcher in the field of Corporate Failure, one would however doubt if it requires any research at all to know that any company which is unable to meet any financial obligations of any type is indeed dangerously distressed and heading for collapse?

ALTMAN'S Z SCORE MODEL

Another empirical studies on the predictions of corporate failure and this time a more objective and thorough one, was the research conducted by Edward Altman which he called the Z score model analysis. He also made use of multi-variate determinants like Mr. Beaver (this is also beyond the scope of this work as it involves too deep mathematical calculations) to produce some predictive symptoms of corporate failure. These he summarised

broadly as Bankruptcy. This, it is submitted, did not in substance depart much from Beavers general conclusions as stated earlier while considering Beaver's studies. However Mr. Altman went further to make certain general conclusions that, first, there is no concensus as to which ratios (refering to all available ratios at that time i.e. those formulated by other researchers including himself) offer the best guide in predicting possible business failure. Secondly, that the accuracy of each prediction becomes more precise as the failure becomes more and more imminent, Thirdly, that if steps are not taken to avert the failure, one or two years ahead of the prediction, it was most likely that the failure would definitely occur. To further press home his conclusions, Altman postulates that while all the available studies had provided much needed information and served as models for future researches, non of them was much helpful in providing definite strategies to combat any symptoms of corporate collapse as much as should have been desired to fight off its occurence. He finally excuses this lacuna or inadequacy to too few available research in the area of corporate failure saying that the science is still grossly under-developed and researched into.[6]

Since it is not possible without mathematical exegesis to discern the symptoms of corporate failure, one would have no choice but to look at the causes of corporate failures as they manifested in companies that had failed over the years so as to determine at least with some certainty without the use of mathematical formulas or ratios the possible causes of corporate failures.

2.2 PERSPECTIVES TO CORPORATE FAILURES

As earlier on noted, there are two perspectives to this concept of corporate failure. One view is the Economic approach while the other is the Legal approach. Both perspectives are to the extreme in opposite directions.

2.2.1 Economic Perspective:

The economic perspective to the concept of corporate failure is viewed mostly from the point of views of financial management which is that the working of the Economic forces of the Money Market and that of demand and supply mechanisms in the economy determines which Company or economic unit should survive, and nothing else.

Corporate failure in the above perspective is seen entirely as part of the workings of a normal capitalist economy which operates subject to the dictates of the market forces which are multivariate. These market forces, i.e. demand and supply and the price indices determines how scarce resources are to be constantly allocated within the economy effectively so that any company which survives is taken to survive because it is meeting the needs of the consumers and this means also that the company is properly allocating and making use of the resources available to it, so that a Company that fails is taken to be unproductive in the first place and so the Market forces compel such a Company to wind up so that its resources are naturally re-allocated to the more viable companies. This economic theory of effective re-allocation of scarce resources within the economy depends on the economic assumption that the market forces of demand and supply and the price system operate efficiently to determine which company is best meeting consumer needs. This fact is evidenced by the extent and amount of consumer patronage a particular company enjoys and the profit margin it declares. This company usually remains buoyant, while

the unviable one grows lean and finally fails and has to be liquidated.

In economic sense therefore, corporate failure which affords an effective re-allocation of scarce resources for efficient utilisation is a healthy and welcome situation. This of course depends upon the assumption that there are more vibrant and viable companies within the economy which could take over the resources previously tied down in the unviable companies that had failed. Although the above concept of re-allocation of scarce resources for more efficient utilisation sounds convincing it is not without its side effects which also adversely affects the Economy socially and economically.

A company which fails creates the problem of unemployment for its erstwhile staff who now become applicants and dependants, rather than producers. The Federal Government loses too i.e. It loses revenue that would have been derived from the Failed Companies via Company tax. These socio-economic problems associated with Corporate failures are however to be seen as necessary by products of the process of efficient re-allocation of scarce resources through the workings of the price system within the economy.

2.2.2 Legal Perspective

The issues of Corporate failures are viewed in the eyes of the law from purely the interests of the parties involved or who have stake in the Company. These interests are usually that of the investor and the creditor, so that the law is not concerned with whether a company is making profits or not, or whether the company is satisfying the interests of the incorporators or the economy at large or not. A Company is the creation of its incorporators, so they decide whether it should live or die. So that where a company is no longer serving the interests of those who have a stake in it, they should be free to decide whether the company should continue or not. A Company that shows symptoms of apparent collapse should be wound up so that the stakes of those persons who had invested or advanced credit to it should be recovered and they should have a choice of where next to invest. This position of the law practitioners generally is based on two presumptions. First Credit advanced or invested should yield profit, so that a capitalist who invests and gets no satisfactory yield should have a choice of where else to invest without having his credit or investment tied down in an unviable venture.

Secondly a creditor who advances credit should be protected from the adventurous whims and capprices of some directors or members of a company who simply would not want to wind up the Company despite that it simply remains unviable, hoping that some how some miracle would happen to revive the company. A concerned Creditor may petition for liquidation in order to recover his money in the event of the inability of the company to meet its obligations, the reason being that if the law does not create a drastic and effective way for Creditors to recover their money from unviable companies, it might affect their willingness to advance credit another time and therefore the effective and efficient allocation of funds within the Economy will be jeopardized, thereby crippling the pace of Corporate development since loan capital remains the most readily available means of financing investment in Nigeria. These legal views even though based on ideals radically different from that of the Economists, they in the end serve the same ideals of achieving a more effective and efficient reallocation of scarce resources from the unviable to the viable companies for efficient growth both in the sector and in the economy at large.

It should be noted however that despite the underlying zeal of the law to allow investors and creditors the choice to decided whether or not to wind up an unviable company, the law also provides for other schemes such as receiverships, mergers, Take-overs, and other schemes of arrangements which could be adopted to grant a failing Company a lease of life to see if it will pick up. The choice is however left to the investors and creditors and other concerned persons to make.

The problems of corporate failure are however of common concern to both Company Lawyers and practitioners in the Corporate sectors, be they lawyers or accountants as much as it is to the economists and financial experts, even though their perspectives of the concept may differ. Leading surveys and researches on corporate failures over the years have agreed on some common causes of corporate failures. These surveys reflect the views of leading financial experts and corporate practitioners.[7] These causes will be looked at briefly.

2.3 CAUSES OF CORPORATE FAILURE

The following are the causes of Corporate Failures:-

Insolvency or Bankruptcy:

This refers to a situation where a company is unable to pay its debts or meet its financial obligations. This situation may either be temporal or perenial.

A bankruptcy may be temporal where the net assets of the Company are over and or above its total liabilities. This type of bankruptcy is refered to as technical insolvency. It means that the Company only has a temporary non liquidity which could be solved by selling off obsolete or dormant machinery or other asset to raise money to meet current expenses or liabilities.

Perenial bankruptcy occurs when a company continuously runs out of or remains in debt without hope of getting out or breaking even, so that selling off any equipments to raise fund may mean putting the Company out of business i.e. its total assets are either equal to or less than its total liabilities.

This condition of financial distress kills a company fast if no corrective measures are taken.

Bankruptcy or insolvency is caused majorly by low returns. This is a situation where a company's investment fails to yield enough profits to sustain the company's expenses, incured, pursuant to the production of the goods and services it Markets. In this situation the company could be said to be in distress and if the shareholders choose to withdraw their investments and creditors become impatient in demanding for their over-due principal and interest, it is not uncommon for them to petition for winding up of such a company.

This factor of low returns is a very potent economic fact that has killed many Companies in Nigeria. A ready example is Ovaltine, West Africa PLC which had gone out of business for several years now.[8]

Due to low returns as a result of inability to market its beverages, the Company could not continue in production - and therefore could not declare any dividends between 1990 and 1993. Between 1974 and 1989 that's a period of 15 years, due to low returns, the highest dividends declared by ovaltine West Africa PLC was 7.5 kobo. Other beverages on the food-drink market provided cheaper alternatives to the ones produced by Ovaltine West Africa PLC. i.e. by 1990 while a 400 grammes tin of Ovaltine product sold for

₦110.00, Cadbury Nigeria PLC sold a 450 gramme tin of Bournvita for just ₦50.00. Ovaltine therefore priced itself out of the market as consumers found solace in the cheaper alternatives available.
Currently, Ovaltine has remained out of production.

Management Problems:

Although the most cases of business failure arise from financial distress, Management problems has in recent times being identified as another potent force that gives rise to business failure. Management problems may take different shapes as follows:

Boardroom Crises: This usually occurs when there is a rift among the board members, with each faction trying to outwit the other in order to establish control. This situation usually leads to a dead lock which makes it impossible for the business of the Company to go on. Where this situation persists, it may lead to the failure of the company.

Lack of skill or dynamism: The art of Management itself requires skill and dynamism in order to adjust to unfavourable conditions the company may face from time to time. Managerial dynamism enables a skilful

board to take prompt decisions, revise strategies or diversify investment in response to any harsh fiscal or Economic condition that is likely to adversely affect the Company. A good example of managerial inexperience or dynamism is the case of ovaltine West Africa PLC earlier discussed.

When the producers of other locally manufactured beverages like Cadbury Nigeria PLC were importing Machinery for local production when the value of the Naira was still strong, the management of Ovaltine PLC were still importing their beverage for local packaging.
When the structural adjustment programme of 1986 was implemented and Foreign exchange became scarce, the other Beverages producers used their imported machines to produce their products locally. Ovaltine PLC did not have the machines because its board did not have the foresight to diversify production to local manufacture, but continued importing. The end result was that while Ovaltine Beverage sold for N110.00 as at 1990, other beverages of the same quantity like Bourvita sold for only N50.00. Thus Ovaltine gradually went out of production because there were no more sales, the

consumer populace having found, cheaper substitutes. This problem of managerial inexpertise is so fundamental that it could dictate the fate of any Company even before it has had the opportunity to attempt to survive. This is because so many companies have been identified to have failed because they were based on faulty business calculations or unproven or unempirical analysis so much so that as the authors of Farrar's Company law puts it, those business could not succeed by any possibility[9]. Chief Odoegbulem Unegbu, a prominent management consultant based in Lagos Nigeria, identifies this problem as the inability of management to predict the viability of an intended investment based on a carefully designed and well written feasibility study before funding.[10]

Inadequate capitalisation: In a developing country like Nigeria where the poverty rate is very high, inadequate capital has become the bane of commercial investment. Even though the Law is liberal by imposing only a small amount as the minimum capital with which a company could be floated i.e. ₦10,000 for private Companies and ₦500,000 for public companies, out of which only 25% is required to be subscribed for in the form of issued shares.[11]

The economic realities of today demand much more than that amount to float a company in Nigeria. Without adequate capital with which to pursue the objects of the Company, it is bound to fail. A company may resort to borrowing as a means of raising capital for its investments but this has two consequences.

First, where the borrowing is resorted to, there is the tendency to continue borrowing if other sources of finance are not available. This leads to excessive gearing i.e. a situation where the company continues to rapidly expand investment with borrowed funds without a corresponding yield in profits, but with the hope that some how profits will come in, enough to liquidate all the acrued debts.

Although Farrar argues that this situation is only a symptom of business failure, to be avoided, other leading authors on financial management differ, holding that it is rather a potent cause of Corporate failure so that a company which is caught in the webb of excessive gearing is already headed for failure[12] as it is effectively an insolvent or Bankrupt company until it pays off all the debts already acrued. It could mean disaster where the creditors simply refuse to agree to any scheme of arrangement to compromise the debt. They may petition

for winding up[13].

Fraud: This is a very strong factor when considering the causes of business failure and its relevance is fast increasing because in our society due to persistent and prevalent poverty, fraud passes easily as a condonable social vice.

Fraud is any form of deceitful or dishonest dealings which results in loss to another person. When fraud is practiced on the company by way of siphoning its funds, diverting its businesses, collecting loans for company purposes but applying it to personal interests etc. It may lead to financial distress in the company and this could lead to failure.

2.4 GOVERNMENTAL POLICIES AND CORPORATE FAILURES

Government especially in developing countries such as Nigeria plays very important role in enhancing economic development. This it does by initiating or promoting and encouraging people and organisations to get involved in ventures especially commercial ventures that would generate more wealth within the economy. When this wealth is generated it may become a tool of oppression by the few who control it. The government then comes in again to

initiate measures that will bring about redistribution of wealth within the economy to enhance development and overall economic growth.

To achieve this goal, government adopts policies and uses various intruments to enahnce this redistribution of wealth to create a more healthy atmosphere that will promote the efficient and effective re-allocation of resources within the Economy through the working of the market forces of demand and supply. These various instruments that the government uses to influence the redistribution of wealth and resources is refered to as fiscal policy. Formulating fiscal policies may call for intervention in peoples choices i.e. increase in Taxes or reduction thereof, placing restrictions or other wise on certain trades or businesses, imposing conditions for certain investments etc. The implimentation of such fiscal policies may occasion harsh and unpleasant conditions adverse to the existence of certain business organisations, as a result such organisations that could not manoeuvre their ways through the harsh conditions end up winding up.

In Nigeria for example, due to the downward slope of the economy after the oil boom of the 1970s, the government of Major General Muhammadu Buhari after coming into power

on 31st December, 1983 proceded to introduce some harsh economic measures to revamp the economy, such as clamping down on foreign exchange transactions, so that foreign exchange became very scarce importation became very much difficult so that companies which had depended on importing parts or raw materials for local production folded up. In 1986, the government of General Ibrahim Babangida introduced the Structural Adjustment Programme which resulted in high inflation occasioned by the devaluation of the Naira. More companies which had a skilful management team manoeuvred through the situation by diversifying investment towards local production. These which could not cope had to fold up. Companies which had obtained foreign loans had to pay back much more than they had borrowed because the Naira had devalued and the dollar had greatly appreciated in value, so that paying back in dollars meant paying more in terms of the amount of Naira needed to meet the appreciated dollar equivalent. Companies which could not cope also had to fold up.

The fiscal policies between 1984 -1992 included the banning of importation of products like wheat e.t.c. This caused many companies which needed wheat as raw materials to fold up where they were unable to get Locally Produced

Wheat as would meet their production demand. Many bakeries folded up as a result.

Further more different types of tariffs were increased to raise more money for government spending in pursuance of economic development, such as custom duties, imposition of import quotas on the number of imports allowed of certain raw materials or products, imposition of Exchange Control and import licences e.t.c. All these measures made raw materials impossible to obtain by certain companies that depended on imported raw materials.

The aims of these fiscal measures was to raise revenue for the government, protect local Industries from foreign competition, correct balance of payments and trade deficits with foreign countries etc.

The combined effects of one or more or all of these several instruments of fiscal policies created a very harsh economic environment for many companies. Those which could, had to cope with the situation, several others which could not cope, folded up.

Statistics available did not reveal how much each and every one of the above mentioned fiscal measures contributed to escalating the phenomena of corporate failure in Nigeria, However, the rate of corporate failure reflect

by the statistics shown in the two tables below is a result of the combined effect of one, or more or all of the fiscal policies introduced within that period.

Table 1: Company Liquidation Rate in Nigeria From 1984 - 1992.

YEAR	COMPULSORY LIQUIDATION	VOLUNTARY LIQUIDATION	TOTAL	%
1984	-	15	15	7
1985	4	9	13	6
1986	3	27	30	14
1987	1	25	26	13
1988	6	23	29	14
1989	4	19	23	11
1990	3	24	27	13
1991	1	17	18	9
1992	6	20	26	13
Total	28	179	207	100

SOURCE: Culled from a series of several Federal Government Gazettes from 1984 - 1992[14]

The above table Illustrates that between 1984 - 1992, the period under review, Nigeria officially recorded a total of 207 Company failures or liquidations,,28 were as a result of compulsory liquidation i.e. by court order, 179 folded by way of voluntary liquidation.

1986 alone recorded the highest number of company failures i.e. 30. It is interesting to note that, that was the same year the Structural Adjustment Programme was introduced by the General Babangida Regime in Nigeria. The period between 1987 - 1992 revealed a fluctuation in the number of liquidations recorded however the fluctuations showed a steady average increase. This meants that after the introduction of the structural adjustment in 1986, six years after i.e. up to 1992, companies were still struggling to survive the effects of the Adjustment Programme, that is to say the economic situation in Nigeria was still unfavourable for companies to survive.

Table 2: Classification of Company Liquidations in Nigeria between 1984-1992.
Developed from table 1 above.

Year	Agriculture	Manufacturing	Service	Others	Total
1984	3	7	5	-	15
1985	-	5	7	1	13
1986	1	7	12	10	30
1987	4	10	6	6	26
1988	1	9	12	7	29
1989	-	7	8	8	23
1990	2	6	9	10	27
1991	-	4	7	7	18
1992	3	5	8	10	26
Total	14	63	71	59	207

A breakdown of the above classification shows that the agricultural sector recorded the lowest number of Company failures showing that they were least affected by the harsh economic policies of the government in the period under review. The service industry recorded the highest failures followed closely by the manufacturing Sector. The fiscal policies introduced were aimed at diversifying the economy from dependence on oil and imports to dependence on Agriculture. The table shows therefore that after the introduction of the Structural Adjustment Programme in 1986. Only one agricultural based company failed, the number increased to 4 in 1987 meaning the effects of the Adjustment was still being felt. By 1988 the number had dropped drastically to 1, on the average there was a steady decrease in company failures in the agricultural sector meaning that the diversification was at least effective. This is because it needed little foreign exchange so, investment in that sector was more appealing. Secondly it means the agriculturally based companies adjusted quickly to the harsh economic climate hence the low rate of liquidation.

The conclusions from the above analysis is that government policies especially in a developing Economy over the years have become a major cause of Corporate Failure. Although the adoption of these harsh policies were meant to correct the imbalances in the economy for maximum over-all growth and development, it seems the same policies were also working against the same ideals of over-all growth and development which the government sought to achieve. However, if viewed from the point of view that harsh economic policies only force ailing and unviable companies to manifest and if they cannot cope they should be liquidated so that there could be a re-allocation of the scarce resources they once held up so that the viable ones may utilise them for maximum economic development of the economy, then the fiscal measure would be justifiable.

2.5 LEGAL REGIMES FOR DEALING WITH CORPORATE COLLAPSE.

The basic law dealing with the subject of Companies and Allied Matters is the 1990 Companies and Allied Matters Act and this law has provided for the procedures for dealing with or containing the incidences of Corporate Failure as and when they arise. These procedures

predominantly aim at taking care of the interests of the investors and the creditors who are usually the only two categories of persons who have a stake in every company incorporated under the Act or indeed any where else in the world.

These procedures as will be discussed shortly are not sequentially arranged as to connote that one particular measure must be taken before the next or other one is considered. The law just makes a general provision of several procedures and leaves it to the persons concerned to choose which procedure best suits their purpose.

These procedures or what I would call legal regimes for dealing with the incidences of Corporate failures are as follows:

1. Receivership
2. Voluntary arrangements
3. Liquidation.

2.5.1 Receiverships:

Receivership is a remedy available to a creditor who advances a loan to a company either in cash or kind and the loan is secured by a charge over the company's assets in the Instrument establishing or evidending the transac-

tion. This instrument is called a debenture deed or certificate and it is usually issued by a company which borrows money or purchases some assets on Credit. The deed or certificate shows the terms upon which the credit was advanced and whether the credit is to be secured by a charge over the company's assets or not.

Where the debenture establishes no such charge, the debenture holder is an unsecured creditor, but where it does, the creditor is a secured creditor and only the secured creditor or group of creditors may appoint a receiver and this they can do whenever their monies are due, but despite making a demand, the monies remain unpaid.

How this operates is very simple. Whereever the credit advanced under a debenture that is secured becomes due for payment, the debenture holder makes a demand for payment if it has not been made already. If the money still remains unpaid and the debtor company does not compound or get a compromise on the debt, the creditor may apply to the court to appoint a receiver over those assets of the debtor company that are covered by the debenture.

Raising Capital for investment by way of loans or loan capital as it is more frequently called has become an

indispensable mode of raising much needed capital so that the law has made adequate provisions for protecting Creditors from unscrupulous company Managers in order to ensure that money advanced is repaid when due. To enjoy this protection a Creditor may insist that the debtor company issues to him a certificate or what is called a debenture and therein specify that a certain or certain assets of the company shall be kept as security that the loan will be paid, so that if it is not paid, the creditor may move in and take over that specified asset as security for the payment of his money.

Usually, several remedies are available as follows:

1. The Creditor may sue to recover his money with the interest,[15]
2. He may petition for the winding up of the Company[16]
3. He may apply for a court order to fore close or sell the security[17]
4. Or He may appoint a receiver over the assets that are covered by the charge under the debenture[18].

A secured creditor may instead of the other first three remedies, choose to appoint a receiver to manage the charged assets until enough money is realised to satisfy

the debt before the asset is discharged.

The term receivership is not defined by the Act, except that S. 650(1) of the Act says a receiver also includes a Manager. However, from the duties of a receiver which will be considered in the course of this chapter, a receiver is a person appointed to take charge of property which is subject to a charge. The said property remains in the physical possession of the debtor, but over which the debtor has no power.

Receivership is a very powerful tool for dealing with incidences of impending corporate collapse which is due to financial distress. When the receiver is appointed, he manages the Assets over which he is appointed, with the aim to recover the principal sum and the interest from the money realised by the receiver through prudent and frugal management. From this money, the Creditor is paid and the costs of the receivership are settled and the balance left over, if any is turned over to the company. Sometimes in the process of conducting the receivership, as aforementioned, the affected company may be revived and placed in a better financial state to pick up. At other times

however, the receivership may not help matters, if the Company is left in a worse financial shape.

There are no Empirical data to determine whether receiverships have over the years helped to revive companies that have had some of its assets subjected to the management of a receiver, However one fact is not in dispute, the option to appoint a receiver gives a financially distressed company a lease of life within which to revive if possible, because the other options to petition for winding up or to foreclose or to enforce the payment of the debt with the interest would place additional pressure on the company which may send it collapsing faster or earlier than it should.

In the case of receivership, the receiver helps the company to generate funds (using the secured assets) with which to pay up the debts rather than leaving the company to raise the money alone. To this extent therefore, receiverships are part of the legal regimes for dealing with the incidences of corporate collapse.

2.5.2 Appointment of a Receiver: General Provisions.

A receiver may be appointed in two ways, i.e. by the court or by the secured creditors[19].

However, before considering the two modes of appointment it pertinent to consider, who may be appointed a receiver.

The Act did not provide for the qualifications which a person shall possess before he could be appointed a receiver, rather it provides that certain categories of persons are disqualified from being appointed receivers or managers. They include, as provided under S. 387 (1):

(a) An Infant

(b) Any person found by a competent court to be of unsound mind.

(c) A body Corporate

(d) An undischarged bankrupt, unless he shall have been given leave to act as a receiver or manager of the property or undertaking of the Company by the court which had adjudged him a bankrupt.

(e) A director or auditor of the Company

(f) Any person convicted of any offence involving fraud, dishonesty official corruption or moral turpitude and who is disqualified under S.254 of the Act i.e. a person convicted by the High Court, of an offence in connection with the promotion, formation management or winding up of a Company or who has been guilty of any breach of his duty to the company he was involved with or where he has been held liable or guilty of an offence, (whether he was convicted or not) under S. 513 of the Act.

Any such appointment which contravenes the disqualifications mentioned above shall be null and void. In addition, if the person so appointed was disqualified under paragraphs (d) - (f), and he acts in the capacity he shall be liable to imprisonment for not more than 6 months or to a fine not exceeding ₦500.ØØ. If the person so appointed is a body corporate as in paragraph (c) above,

it shall be guilty of an offence if it proceeds to act in that capacity and shall be liable to a fine not exceeding ₦2,000.ØØ.[20] The above sanctions are not effectual upon the appointment being made in contravention of the said provisions, but when the person Appointed proceeds to act in that office or capacity. However, where a person was acting in that capacity before the commencement of the Companies and Allied Matters Act, 1990, he is not caught by the sanctions of the said S. 387 (2) of the Act, rather he may continue to remain in that office until he is removed upon the application of an interested person.[21]

2.5.3 Appointment By the Court.

Section 389 of the Act allows a secured Creditor to apply to the court to appoint a receiver, or receiver and Manager to manage the property or undertaking of a company which is subject to a charge under a debenture that has become overdue for discharge by the Company. Only a debenture secured by a charge may be realised by way of appointing a receiver over the secured asset or undertaking.[22]

A secured Creditor may apply to the court for the appointment of a receiver under the following circumstances:

Where the security is in jeopardy, the Court may not withstanding that the charge over the Company's assets or undertaking has not become due, proceed to appoint a receiver if it is satisfied that the security of the debenture holder is in jeopardy. The court will infer jeopardy where it is satisfied that events have occured or are likely to occur which makes it unreasonable to allow the company to retain the power to dispose of its assets considering the interests of the debenture holders. What would amount to jeopardy in this case? Under the common law, the courts have held the following circumstances to amount to conditions likely to place the security of a debenture holder in jeopardy, that is, where the company has closed down or is likely to close down all or a substantial part of its businesses,[23] or where the company is distributing dividends to share-holders from its reserved funds or disposing of its assets for inadequate consideration as would likely leave the debenture unsecured or insufficiently secured.[24] Or where there is a dispute among board members to the extent that the affairs of the Company are neglected or

which render it impracticable for the company's affairs to be effectively managed.[25]

Section 208 (1) (a) - (d) of the Act also specifies other conditions which may give a Creditor right to apply to the court for a receiver to be appointed. They are where there is a default in payment of the principal sum and or interest acrued or any part thereof when due, or where there is a Breach of any of the conditions imposed by the debenture deed or where any circumstance occurs which the debenture provided that if it occurs, the debenture becomes enforceable or where the Company is being wound up. Further more S. 208 (2) provides that in the case of a debenture secured by a general floating charge, he is entitled to the additional right to realise his security if any creditor of the company issues a process of execution against any of the company's assets or commences winding up proceedings against the Company by order of a competent court, or where he notices that the company ceases to pay its debts as they fall due, or where the company ceases to carryon business or where the Company's assets diminution in value after the issue of the debenture. In addition to this common law position, by the operation of S. 389 of the Act if any

of the above stated conditions occur, the secured Creditor may apply to the court to appoint a receiver over the assets or undertaking of the company as are covered by the debenture.

2.5.4 Status of Court Appointed Receiver.

S. 389 (2) clearly confers the status of "an officer of the court" on the court appointed receiver as such he is to act only in accordance with the directions and instructions of the court. This position was long settled under the common law. The court in Parsons V. Sovereign Bank of Canada[26] held that a court appointed receiver was in the status of an officer of the court and so was not subject to the control of the debenture holders who applied for his appointment and neither was he subject to the control of the company as if he were an officer of the company. The receiver here was held not to be s ubject to the company instructions or directions of the debenture holders nor that of the Company, but that of the court only. The reasoning behind this dictum in my view was sound because if the debentur e holders wanted a receiver who would be subject to them they have the legal option to appoint one themselves. As for the Company, since the receiver was not appointed by the

Company, nor was he appointed to protect her interest, he could not be subject to her. To put matters straight, the court appointed receiver is neither an agent of the company nor of the debenture holders concerned, but an agent of the court.

The impact of the appointment of a receiver whether by the court or by the secured creditors themselves is that it effectively removes the assets or undertaking that are subject to the charge out of the control of the company even though the company may be in physical possession, at the same time the power of the receiver to manage the company's asset or undertaking is subject or limited only to the Assets or undertakings covered by the charge and no more. However, the Company is estopped from dealing with its other assets or undertaking as would prejudice the interests of the secured creditors in respect of the assets they hold as security for their money.

Because the court appointed receiver is an officer of the court or is deemed to be such, he is clothed with judicial immunity in the discharge of his duties therefore no action may be brought against him for acts done in the course of his duties as an officer of the

court. In the same vein, interferance with his duties by any person is contemptuous of the court and this invites severe sanctions.[27]

Since the court appointed receiver is an officer of the court, the court fixes his remuneration and the expenses he incurs in the course of his duties are compensated for out of the monies realised from the property or undertaking over which he has been appointed receiver, but he remains personally liable under any contracts he enters into, unless if the terms thereof specifically provide other wise.[28]

The next question is whether the said receiver owes any fiduciary duties to the company or the debenture holders? The Act is silent about this issue with respect to the court appointed receiver unlike in the case of the Receiver appointed by the debenture holders themselves, who owes them fiduciary duties .

The courts have over the years held that the court appointed receiver stood in a fiduciary relationship of a unique specie and Eve, J. puts it this way, a court appointed receiver "... not only fills a fiduciary position towards all the debenture holders, but his appointment to an office of such responsibility

presupposes that he will discharge his duties with punctilious rectitude"[29] The authors of Farrar' Company Law commented, in view of the above submissions that this fiduciary position is so strong that a court appointed receiver (and indeed any other receiver) is precluded from purchasing the interests of any one of the debenture holders,[30] while the receivership lasts. It is therefore not in doubt that the law imputes a special specie of fiduciary relationship between the court appointed receiver and the debenture holders, but whether this same specie of relationship also exists between the said receiver and the company over whose assets or undertaking he has been appointed manager is doubtful. The Company seems helpless in this situation so that where the receiver's actions are to the best interests of the debenture holders but inimical to that of the over all or part of the interests of the Company. The debenture holders themselves are not safe either, where the receiver acts in such a manner that they consider as not being in their best interests what can they do since the law says the court appointed receiver owes his allegiance to no one else but the court

therefore what is the locus of the debenture holders if they wish to enforce the fiduciary position of the said receiver in relation to their interests as debenture holders? It is submitted that as beneficiaries of whatever is to be realised from the duties of the court appointed receivers, they may petition the court on that basis to enforce the fiduciary position or duties of the said receiver, since that is the only nexus between them.

2.5.5 Receiver Appointed Out of Court.

A receiver may be appointed by the debenture holders themselves or by a trustee appointed by them, if the debenture deed contains a provision granting power to the debenture holders to appoint a receiver out of court when ever their security was due to be realised[31]. By S. 390 (1), (2) (a) & (b) of the Act, a receiver appointed out of court by the debenture holder is an agent of the persons who appointed him. He is also deemed to stand in a fiduciary relationship also to the Company and as such should observe utmost good faith towards it and should act at all times in what he believes to be the best interests of the company as a

whole so as to preserve its assets, further its business and this the receiver should do in the same manner as a skilful, faithful, careful and diligent manager would do.

From the foregoing it is noted that a receiver appointed out of court by the debenture holders is their agent. This is proper since they are his employers, therefore agency obligations with all its legal implications will therefore flow from this relationship. However, what sounds surprising or rather appalling is the rational behind creating a deemed fiduciary relationship between the receiver and the company from a relationship that flows between the receiver and those who appointed him to work for them, whereas the same is not statutorily provided for in the case of a court appointed receiver. It is even surprising to note that the same degree of fiduciary responsibility imposed on Company Directors in S. 279 of the Act is the one required of a receiver appointed by the debenture holders, that means the same responsibility a company director owes his company also applies to a receiver appointed out of court by the debenture holders, when there is no nexus or privity of contract between he receiver and the Company to warrant this enormous responsibility placed

on him toward the Company.

Under the Common Law however, this fiduciary relationship is only involed if it was provided for under the debenture deed itself[32].

One would however understand or appreciate the position of the law better if the whole circumstances are looked at from an objective and dispassionate view.
The court appointed receiver is responsible to the court and takes his instructions from it and not from any other person. It is only logical to believe that the court as a temple of justice will only instruct the receiver to act in what the court feels is in the best interest of the debenture holders and as well ensure that the company is not unnecessarily tasked as to prejudice her over-all interest, since the aim of a receivership is to help the company manage its assets or undertaking which is subject to a charge as would yield enough proceeds to repay the debt.

A debenture holders' appointed receiver however is their sole agent and must obey their instructions and normally protect and promote only his principal's interest.
The imposition of a fiduciary responsibility on the

receiver appointed out of court is to protect the vulnerable and helpless company from undue exploitation, considering its necessitous position. Without this protection, an over-zealous receiver wanting to please his appointors may resort to indiscriminate disposal or mismanagement of the assets over which he was appointed receiver if only to realise his masters credit. Furthermore, where it becomes necessary to foreclose the charged assets, the receiver may be tempted to dispose of the charged assets or undertaking at any available price without taking the pains to obtain a fair market value, so that the law at present is that a receiver who disposes of a companys assets over which he is appointed receiver either with intent to defraud it or without due care and diligence to obtain a fair value will be liable to pay damages to compensate any loss the Company suffers in consequence thereof[33].

It should however be noted that the debenture holders' appointed receiver as an agent of his appointors owes them a primary duty to perform his duties as instructed by them and to obey as well as act in utmost good faith to his employers. He does not owe the Company any duty to rebuild it, although rebuilding it may be the only

way he may realise his master's security and to this extent he must also as the law requires take care to properly rebuild the Company so as not only to realise his masters security but also as would benefit the company and if possible revive it.

The problem here is what would be the receivers primary allegiance where taking a particular decision would be in the best interest of his appointor but unfavourable to the company as to breach the statutory duty to act in what he believes to be the best interests of the Company ? In looking at this problem the common law courts have laid down precedents which suggest that in a situation of conflict of interests, the receiver appointed by the debenture holders must do what is in the best interest of his appointors. In RE B. JOHNSON & CO (BUILDERS) LTD[34] Jenkins L. J. held that a receiver appointed by the debenture holders was not an officer of the court as to be liable to prosecution under a misfeasance summons during winding up proceedings as a person whose conduct contributed to the winding up of the company. This implies that if the receiver had acted in what is the best interest of the debenture

holders and this in one way or another contributed to the collapse of the Company, the receiver cannot be prosecuted for having deliberately contributed to the collapse of the company, under a misfeasance proceeding. His Lordship concluded that the whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed the company by its own directors or managers.

This decision of the Court of Appeal (England) leaves no one in doubt that even though the receiver in this case owes the company a fiduciary duty akin to the one owed it by its directors and managers, the degree defers, so that in the case of a receiver appointed by the debenture holders he discharges his fiduciary responsibilities to the company but he does so subject to his primary responsibility to his employers, since he does not owe a primary allegiance to the Company as do the Company's own directors and managers.

2.5.6 Powers/Duties of Receivers Generally.

The general powers of a reciver are provided or specified in the 11th schedule to the Companies and Allied Matters Act 1990 pursuant to S. 393 of the Act and these powers are also the duties of the receiver and they apply to a receiver whether he be court appointed or one appointed by the debenture holders themselves. These powers or duties apply subject to any specific or general provisions contained in the debenture deed and the said powers shall apply only to the extent that they are not in consistent with those provisions in the debenture.

In addition to these general powers provided for as mentioned above, there are other powers or duties specified in several other sections of the Act and these could be found in S. 208 (1), 209 (3) & (5), etc. Some of these powers or duties are specific and others are to be construed. These powers or duties relate only to the management of the charged assets to generate the needed money to pay off the debt under which the assets are charged.

2.6 PROCEDURES AFTER APPOINTMENT OF RECEIVER

After the receiver has accepted his appointment as such, he now has to send notice of his appointment forthwith to the Company together with the terms of his appointment. S. 396(1) requires that immediately the receiver complies with this requirement, the Company shall within 14 days or such longer period as may be allowed by the court or the receiver, make out and submit to the receiver a statement of the affairs of the Company. S. 397 specifies that the statement shall contain such details as the names and addresses of the company creditors and the extent of the debts owed, a particulars of the Companys assets etc, verified by affidavit by at least one director and the Company Secretary. The receiver is required to send to the Corporate Affairs Commission or to the Court a copy of the statement and accompanied by the receiver's comments as he deems fit to make thereon, a copy of which he will also send to the company concerned and also to the trustee of the debenture holders if they were acting through one, other wise he is to send to each debenture holder as far as he knows their addresses, a copy of his said comments.

In order to ensure that the receiver performs his duties properly, he is required to give periodic account of his stewardship, a copy of which, at each period goes to the company, the Corporate Affairs Commission and to each of the debenture holders as far as he knows of their addresses or to their trustee if they are acting through one.

The following is a breakdown of the accounting periods as specified by S. 396 (2) of the Act:

The receiver shall send a statement of his stewardship at least 2 months or any longer period allowed after the First 12 months or one year. He has to send the said statement of his stewardship at least no more than 2 months after the expiry of that year. If however he ceases to be a receiver at any point in time, he shall send the statement within two months of ceasing to be in office. The above periods apply to a court appointed receiver only.

For a receiver appointed by the debenture holders, he is required to submit the abstract of his statement of the account of his stewardship within one month or such longer period as may be allowed by the Corporate Affairs Commission after the expiry of the first six months of his

appointment and this shall continue for every subsequent six months thereafter, and one month from the date he ceases to be a receiver. The statement of abstract of the receiver's stewardship is a summary of his total receipts and payments out of the funds the receivership yields. It is a criminal offence for any receiver to default in giving the above required account of his stewardship.[35]

2.6.1 Disbursement of Funds Realised Under The Receivership.

In disbursing the funds realised under the receivership, S. 182(1) provides that those debts which are normally to be paid in preference to other debts in a winding up must also be paid first before any other payments are made to creditors in a receivership. These payments are specified in S. 494 (1) of the Act and they should be paid in preference to all other claims under the receivership. These include all local rates, Taxes and other charges due from the company,

salaries or wages due to a clerk, servant, workman or labourer employed under the receivership etc.

concerned, the receiver and his staff which he employs to help in conducting the receivership become the managers of the said assets or undertaking unless a different person other than the receiver was appointed to manage the said assets or undertaking in which case he becomes the manager.

Further more S. 392 (1) requires that every invoice, order for goods, business letter etc. issued by or on behalf of the company or the receiver or manager, the said documents being issued where the name of the company appears, must also indicate the fact that a receiver and or manager has been appointed for the company.

Finally, after the receivership is discharged and the receiver vacates office, the company is left alone to continue, that is if it had not gone into liquidation during the pendency of the receivership. If however the reverse is the case and the company after the discharge of the receivership is free from the debts that gave rise to the appointment of the receiver, it now has another lease of life to try and revive.

Although as earlier on noted, the receiver or manager owes no obligation to the company to rehabilitate it, however in the process of managing its assets or under-

taking under the receivership, there may be the need to restructure the Company to the extent possible under the receivership and this might help the company to revive and pick up and .. be able to generate funds to discharge the debenture as well as continue its operations, in which case the receivership has helped in dealing with the impending collapse which hunted the company prior to the receivership.

However, the receivership may not always achieve this purpose where it is impossible as the receivership is not a guarantee that the company will and must revive.

2.7 SCHEMES OF ARRANGEMENTS.

This is another potent tool for the reconstruction or revival of a failing company which is facing financial distress and possible threats by Irate Creditors and share holders who have run out of patience coping with a Company that is yielding little or no dividends at all.
The provision for schemes of arrangement in the 1990 Companies and Allied Matters Act is one of those progressive innovations that makes the Act abreast with current trends in the Corporate world.

The schemes of arrangement provided for under the Act are three in number, i.e. Arrangements and Compromise, Mergers, and Takeovers.

2.7.1 Arrangements and Compromise

This scheme is provided in S. 537 - 540 i.e. Part xvi of the Companies and Allied Matters Act 1990. Under this scheme, a company that is facing financial problems that has defied all other solutions may make or accept proposals for an arrangement or compromise with its members or creditors with a view to reaching an understanding with them as would allow the company a lease of life to try and recover.

This scheme is an internal arrangement and it is open to a company that is financially distressed so that it is yielding little or no dividends to its shareholders and or, is unable to satisfy its obligation to creditors as and when they become due.

Any affected member or creditor or class of them, or the company itself or if the company is undergoing liquidation, then, inclusive of the liquidator, may apply to the court for an order to convene a meeting of the members or creditors or class of members or creditors as the case may be in such a manner as the court may direct for the

purpose of reaching an arrangement or compromise that would help the company to recover from its distress position, if possible. Whether or not it is under liquidation process is immaterial, a company's liquidator may also arrange for the above said meeting to be called for the same purpose aforesaid.

The Act did not define what a compromise means but it provides in S. 537 that "arrangement" means any change in the rights or liabilities of members, debenture holders or other creditors of a company or any class of them or a change in the regulation of a company made pursuant to the provisions of part xvi of the Act dealing with arrangements and compromise.

The Oxford Advanced Learner's dictionary of Current English[36] defines a compromise as "settlement of a dispute by which each side gives up something it has asked for and neither side gets all it has asked for" Arrangements and compromise therefore connotes that the company may enter into agreement with its creditors and or members in which the members and creditors and the company agree to alter their rights and liabilities in such a manner as would be beneficial and agreeable to all of them and as well allow the company some time to

undergo the restructuring agreed upon with view that it revives. In this regard the creditors may compound the debt for the company or extend the due date in exchange for some consideration or some of the creditors may give up their debentures or securities in exchange for shares in the company[36(a)] or agree on any other arrangement or compromise that would suit their purpose.

The Act has not provided any limit to the kinds of arra arrangement or compromise that may be explored by the Company and the parties concerned, therefore, it is safe to assume that they may agree on any scheme of arrangement or compromise agreable to them that is legal.

However, caution must be taken to avoid such schemes as would be ultra vires the company's powers[37], or contrary to other existing laws other than the relevant Companies Act[38] and finally the scheme must be such as would benefit the parties in some way, so that there is no undue advantage or duress.[39]

2.7.2 Procedure for Arrangement and Compromise

The procedure for reaching an acceptable arrangement or compromise is provided for in Sections 539 and 540 of the Act. This procedure is as follows:

An application is brought before the court by either the Company or a member or creditor or class of them or where the company is being wound up, by the liquidator, for an order of the court that a meeting of the members or class of members or of the creditors or class of creditors be summoned in the manner the court may direct. This order is at the discretion of the court to grant depending on the strength of the affidavit of facts verification that accompanied the application which is usually by petition. A copy of the proposed scheme is required in practice to be annexed to the petition. At the hearing, the applicant or his counsel must show sufficient reasons why the court should execise its discretion to order that the meeting be called. These reasons are usually deposed to in the applicants affidavit in support of his application, setting out those reasons which the counsel now argues verbally.

In addition, counsel to the applicant must convince the court based on the facts deposed to in the affidavit, that he is likely to secure the requisite majority of the creditors or members or a class of them as the case may be to attend the meeting. He must also show that the scheme proposed is fair to all the parties concerned.[40] After hearing the application which the Act provides should be in a summary way i.e. by motion exparte, (the parties are not required to be served with the said application for them to appear before the court hears the application) the court may if it is satisfied proceed to grant an order allowing the meeting to be summoned and (in the manner it may direct.

Section 540 says what is to be done after the court grants the order.

A meeting of the persons mentioned in the court order, be they creditors or members shall be called in accordance as the court has ordered, it is doubtful if recourse could then be had to the procedure for meetings as provided under the Act[41] The proper position however, it is submitted is that, whether the court gives an order as to how the meeting is to be summoned or not, S. 539 and 540 makes

a specific provision on how the meeting is to be called and conducted.

These specific procedures are as follows:

A notice of meeting is served on all the parties mentioned in the court order or additionally on all those who are entitled to attend as concerned persons. A copy of the court order is attached as a matter of practice for the information of those summoned to the meeting.

The notice of meeting shall include information explaining the scheme to be proposed and the possible effects of the scheme and in particular the interest of the directors of the Company in the scheme and the capacity in which they have such interest, and whether such interest is different from the like interests of the others who are also concerned in like capacities as the directors i.e. whether as directors, members or creditors or both or in all three capacities.

Where the meeting is summoned by way of advertisement, the above said particulars must also be included and in addition, the specific address of the venue of the proposed meeting must be stated or if the said information is not included in the advertisement, then it must state the place where those concerned may go and obtain copies of

the said statement or information. Where the proposed scheme affects the debenture holders or their trustee, the Act includes a specific requirement that the statement or information to be sent explaining the effects of the scheme, must, include such facts as the interests of the said debenture holders in the scheme and in what capacity they hold such interest(s) whether as members, directors or just creditors or other wise and the effects of the proposed scheme on those rights, stating whether the effects would differ from those of the other persons concerned and if so, in what way.

When the meeting has been called as aforesaid, the proposed scheme of arrangement or compromise is presented and all the relevant informations will be disclosed and necessary explanations made to the satisfaction of all concerned persons present, thereafter, S. 539(2) provides that for the scheme to be approved, three-quarters i.e. ($\frac{3}{4}$) in value of shares and Number of members or creditors or class of them as the case may be, present and voting at the meeting either in person or by proxy must have approved of the scheme. The implication here is that it requires a special resolution[42] to approve of a scheme of arrangement and compromise. A simple majority would not do.

The final draft of what has been approved as the agreed scheme of arrangement and compromise is prepared and annexed to another application to the court urging it to sanction the scheme for implementation as the agreed and approved scheme of arrangement between the Company and its creditors and or members as the case may be. If the court is satisfied with the compromise or arrangement, it shall sanction it and it thereby becomes binding on all the creditors or members or class of them as the case may be, or on the liquidator, if the Company was undergoing Liquidation.

It is very interesting to note that looking at S,539 (3) even if the proposed scheme was approved by the requisite majority under S. 539(2), the court still has a discretion to enquire to find out to its satisfaction whether it is equitable to sanction the scheme or not. Under the common law this discretion of the courts has been interpreted to mean that the courts should only approve of the scheme after the following considerations have been satisfied;

First, the court must ensure that the requirements of the law on how the scheme is to be arrived at have been complied with[43] i.e. requirements as to giving of notices

or mannner of calling meeting, facts to be disclosed in the notices of meetings, the type of majority required to approve the scheme etc.

Secondly that the scheme is such that a reasonable man of business will approve, so that if the scheme is such that in the opinion of the court a serious man of business would not reasonably have approved of the scheme, the court will withhold its sanction. In arriving at the conclusion, whether or not to sanction a proposed scheme under this heading, the court will consider whether the proposed scheme was fair or equitable in the circumstance, due regard being had to the wishes of the majority. The discretion granted the court here to sanction or reject a proposed scheme of arrangement if after enquiring into it, it considers it to be unfair to the parties involved with due respect is inquisitorial and not accusatorial as should have been in accordance with our legal procedure in Nigeria i.e. our courts only make enquiries into a case when there is an allegation of facts brought before it by an aggrieved person, where there is none, it is not for the courts to start enquiring into facts for which there were no complaints.

However, in exercise of its powers under S. 539(2) the court in order to determine whether a proposed scheme is fair, must of necessity enquire into the proposed scheme even if non of the parties to the scheme was complaining and the court may proceed to reject the proposed scheme even if all the parties thereto believe reasonably that the proposed scheme represented their truest wishes.

The above inquisitorial stand of the law is only one of the relics of state welfarism that has refused to give way to the current laissez-faire approach to commercial transactions in Nigeria.

The position is the same under the Common Law, and it is submitted that - this inquisitorial position of the Law as seen in S. 539(2) of the Act is only but a codification of the Common Law position.

In RE N. F. U. Development Trust Ltd[44] Brightman, J. held that a scheme cannot be a sbheme of arrangement and compromise where it only amounts to an expropriation of the rights of members or creditors without any corresponding advantage. He went ahead to hold as invalid a scheme which in his view amounted to a total forfeiture or deprivation of the rights of Creditors.

At page 1555 of his judgement, the learned judge opined that no voting (whether of the requisite majority or not) which was done in the interest of the creditors as a whole would approve of such a scheme.

In RE DORMAN LONG & CO.[45] Maugham, J. puts the whole issues bluntly thus[46]

> "It is plain that the duties of the court are two fold. The first is to see that the resolutions are passed by the statutory majority in value and number ..... at a meeting or meetings duely convened and held. The other duty is in the nature of a discretionary power .... in my opinion ... so far as this second duty is concerned what I have to see is whether the proposal is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve."

The first duty of the court as stated by his Lordship above is to ensure that first of all the proposed scheme is passed by the requisite majority both in value and in number. This means that there must be a special majority and this special majority must represent not less than three-fourth in value of shares of members or of the interest of creditors, so that a simple majority if they do not also constitute a special majority of the stated three-fourth interest in value as aforesaid, cannot validly approve of a scheme as would bind all the others concerned. This provision tends towards

protecting minority interest, so that where a minority that has a majority stake in the company does not feel it is in their interest to approve of a scheme, a numerical majority alone cannot over-ride the wishes of this minority, since a scheme must not be sanctioned by the court for whatever reason if there is no evidence that the requisite Statutory Majority both in value and number had approved of it in a general meeting properly convened and held.[47]

As regards the other power of the court as mentioned in the dictum of Maugham, J. supra, which is the discretionary power, under S. 538(1) whether to allow for the meeting to be called where a proposed scheme of arrangement is to be discussed and under S. 539 (3) whether or not to sanction the proposed scheme that has been approved by the statutory majority. It is in exercise of this discretionary power that the courts have assumed an inquisitorial role of facts finding so as to arrive at a decision on whether to sanction the proposed scheme or not.

The question here is the propriety of the court exercising its discretionary power to decide, what is fair to the parties despite that the procedure for

arriving at the proposed scheme has been complied with and no one is left dissatisfied?

Brightman, J. in Re N.F.U. Development Trust Ltd and Maugham, J. in Re Dorman Long & Co. Supra appears to say that the court has a duty to enquire into the approved scheme to see or satisfy itself that the proposed scheme was fair to all the parties, whether or not anybody was complaining. In doing this, the court will apply the test "Would a reasonable and honest member or creditor voting in the interest of the members or Creditors as a whole approve of such a scheme?". If after applying this test, the court is of the view that no such member or creditor would have voted in favour of the said scheme, it will proceed to reject the proposed scheme.

From the foregoing, it would appear that when it comes to the issue of giving Judicial sanction or approval to a proposed scheme of arrangement and compromise, the court have the discretion to choose what is good for the parties concerned so that whether in the end the said scheme is fair to all the parties concerned is for the courts to decide and not the parties involved.

The question that arises therefore is whether considering that our legal system permits a Laissez-faire attitude towards commercial investments and transactions, it would be fair for the court to probe further into a proposed scheme to see if it was actually fair despite that the parties involved have in a general meeting properly called and held for that purpose approved a scheme as being a fair representation of their true wishes of an arrangement and compromise?

Professor Gower[48] argues forcefully that normally the courts should only give assent to what the parties have presented to it as the approved draft of the proposed scheme of arrangement once the provisions of the Law have been complied with. In that regards, he stated that the mere fact that the proposed scheme is backed by the blessing of the requisite statutory majority is sufficient to raise a strong inference of fairness, an inference which he said objectors are rarely able to rebut and the courts cannot readily investigate the indoor management of a company to find out if the scheme was actually as fair as it appears.

To press this arguement further, it would be interesting to note that the court of Appeal (England) Per Lindley, L. J. in Re English, Scottish and Australian Chartered

Bank[49] stated that where the creditors and it is submitted this will also apply to all the other parties to the scheme i.e. the members of the company etc, receive full information as required by the Law and sufficient time is given for them to consider the proposed scheme before approving of it or otherwise, the courts should not generally interfer with the proposed scheme. The court specifically stated[50] ".... if the Creditors are acting on sufficient information and with enough time to consider what they are about, and are acting honestly, they are, I apprehend much better judges of what is to their commercial advantage than the courts can be."

It is therefore logical to conclude from the above dictum that when the Act stated in S. 539(3) that the court may sanction a scheme if it is satisfied as to its fairness, what is meant is that where the parties to the proposed scheme are of the opinion that the scheme is fair to them, the court must hold that it is fair, to do otherwise would be inimical to the golden rule of interpretation i. e that the court should interprete an Act with view to doing what is best to the parties, and more so in the absence of any successful objection thereto, the courts must not pry into the proposed scheme with view to fault it. A scheme therefore should be held as fair if it

enjoys the approval of the requisite statutory majority both in value of shares and Number of Votes. This requirement is enormous in itself and it is strong enough to raise an indefeasible presumption of fairness.

To conclude, I will not fail to add that in as much as it has been argued that where there is a prima facie case of fairness which is evidenced by the approval of the required statutory majority, the courts should not pry further unless there is a very strong objection to the scheme, there is however the need for the courts to look carefully at the scheme to at least ensure that it is fair because as Professor Gower puts it,[51] the arguement that the parties to the scheme know what is good for them more than the courts is based largely on the fundamentally false assumption that the votes of those voting necessarily represents the informed opinion of the majority of members or creditors of the class concerned. This is true in the light of the fact that those who propose a scheme would have already set a stage for it to succeed and in such circumstances the possibility of fraud and distortion or mistatement of the exact facts cannot be over-ruled.

Sometime the parties involved may not possess the prowess to dictate skilfully distorted facts, and where this occurs, the vote of the requisite statutory majority cannot be held as truly representing the fair view of those concerned, and therefore to protect the unknowledgeable parties, the courts as the temple of justice must be seen to do justice in every case that comes before it. It is in view of the above wider principles of justice that S. 539 (2) of the Act enpowers the court, if it so wishes to refer the proposed scheme to the Securities and Exchange Commission (SEC) which shall appoint one or more inspectors to investigate the fairness of the said scheme and make a written report to the court within the time specified by the court. This will enable the court to more properly exercise its discretion whether to approve of the scheme or reject it, based on expert report or opinion which itself is based on facts resulting from the said investigation.

It is submitted that the above procedure i.e. refering a proposed scheme to the Securities and Exchange Commission for investigation, should be observed before the court exercises its discretion since discretion should be exercised judicially and judiciously, otherwise the court cannot be said to be judiciously exercising its discretion

without imperical facts placed before it, and if the court wishes to despense with the option to call for the said investigation it should approve of the scheme if it prima facie appears to be fair Maugham, J. puts it more purposefully in Re Hoare & Co. Ltd. as follows[52]

> "prima facie, the court ought to regard the scheme as a fair one in as much as it seems .... impossible to suppose that the court in the absence of very strong grounds is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned".

It is submitted that a report from an investigation carried out by the securities and exchange commission as directed by the court, if it raises even a slight presumption of unfairness would constitute "very strong grounds" for the court to if satisfied that such a presumption is founded proceed to withhold its consent for the scheme to be proceeded with until the suspected unfairness is purged.

Once the scheme has been approved by the court in exercise of its judicial discretion under S.539(3) of the Act, the scheme of arrangement, so sanctioned becomes binding on all the members and creditors or their classes respectively. The crucial aspect here is that there is no room for dissenting members or creditors

once the court has sanctioned the proposed scheme since S. 539(3) says there upon, the scheme mandatorily binds all the members and shareholders alike. It is assumed that since the majority required to approve of the scheme is so large that almost every member is involved i.e. ¾ majority in value and number of votes, and also considering the fact that the court has to look into the proposed scheme to ensure that it is fair to all the parties concerned, the Act has adequately taken steps to ensure the protection of minority interest. Once the court has sanctioned the proposed scheme, S. 539(4) requires that a certified true copy of the courtès order sanctioning the proposed scheme, shall be delivered to the Corporate Affairs Commission for registration and only thereafter does the said order have effect. The Company is required to ensure that the said registration is done. A penalty of ₦5.00 per day is imposed on the Company and any of its officers who defaults in obseving the above said procedure, as required by S. 539(5).

Finally, it should be noted that the inclusion of provisions for schemes of arrangements and compromise in part xvi of the Companies and Allied Matters Act

1990 is to facilitate and legalise compromises between financially distressed comapnies and its creditors and or members, so that instead of invoking their rights to petition for compulsory winding up of the Company, they may compromise with the company in order to give it a lease of another period of life span to see if it revives. If this happens the aim of the Act of providing for scheme of arrangement and compromise would have been achieved.

2.8 MERGERS AND TAKE OVERS

Takeovers and Mergers are now a novel phenomena of Modern Company Management according to Orojo[53] which are used to effect structural changes in a Company with a view to reconstruct it for better performance without necessarily liquidating it.

Mergers and Takeovers are another procedures provided under the Act to be exploited by Company Operators to re-organise a failing or . unviable Company with the aim of making it more viable and productive, by this means the Company under goes Structural changes which might affect the rights of the members and creditors

or the Company or all of them together. Mergers and Takeovers are covered by S. 591 - 593 and S. 594 - 613 of the Act respectively.

A Merger is defined in S. 590 as any amalgamation of the undertakings or any part of the undertakings or interests of two or more Companies or the undertakings or part of the undertakings of one or more Companies and one or more bodies corporate.

Takeover on the other hand is defined in the same section Ibid as the acquisition by one Company of sufficient shares in another company to give the acquiring Company control over that other company.

A closer look at the above wtwo definitions reveal that, a Merger is a sort of business combination by two or more Companies whereby they combine their undertakings and or interests and in the process the two or more Companies merge or become one single company either under a new Corporate name or under the name of either of the former two or mote merging Companies.

A takeover on the other hand is a situation where the Company whose majority shares have been acquired does not merge into the acquiring Company as to lose its

identity, rather by having its majority shares acquired by another company, it becomes a subsidiary of that Company whilst retaining its former Corporate personality. The effect being that the target company loses its independence and now has to be subject to the control of the acquiring company.

When a merger takes place, the undertakings, interests, properties and liabilities e.t.c. of the merging companies are transfered to the new company that emerges under the merger or amalgamation, under the common law these interests and liabilities as aforesaid do not include contracts of personal services entered into previously by the former Companies with their employees or servants etc[54]. The implication is that, if such employees are not absorbed by the new Company, they stand dismissed because their contract of service terminated as a matter of law, with the termination of the former companies. This view was adopted by the Nigerian Courts[55] and it stands as the proper position of the law in Nigeria in the absence of any statutory provisions, Unless there is any prior agreement between or among the amalgamating Companies to the contrary. It is not clear if the same position also applies to Takeovers, however it may be safely

concluded that since the target company only lose its management control to the acquiring Compaby and not its separate or distinct personality, it remains bound under all her previous contracts of service with its employees.

2.8.1 Types of Mergers & Takeovers

Mergers and takeovers may take the following shapes:

Conglomerate Mergers or Takeovers: These are business combinations involving different companies, involved in different kinds of undertakings coming together under one general name to form a conglomerate of Companies an example of a Conglomerate in Nigeria is the United African Company of Nigeria PLC (U.A.C.N.) which is a combination of several Companies in Nigeria.

Vertical Integration: This is a situation where two or more Companies involved in the same industry but involved in different levels of production decide to combine their businesses in order to enjoy the economies of large scale production e.g. Company A is involved in producing Rubber, Company B is involved in producing Rubber shoes and plastics. A combination between Company A and B above would amount to vertical integration since

all of them are in the rubber industry only that they are engaged in different levels of production.

Horizontal Integration. This occurs where Companies involved in the same level of production within an industry decide to combine their businesses. This combination is usually aimed at joining forces to bring the market under a single control by way of creating a monopoly and at the same time removing competition.

The above integrations could be achieved either by way of Mergers or Takeovers.

2.8.2 Reasons for Mergers and Takeovers

Many reasons have been adduced to explain why mergers and takeovers are or have become a growing phenomena in the face of unprecedented spate of Corporate decline. These reasons include the following:

First is the need to take advantage of the economies associated with large scale production. This Lowers Unit Costs of production and thereby reduces the price of the goods per unit. The result is that Lower unit prices leads to increased sales and therefore the rate of turn over enlarges meaning huge profits will result.

Large Scale Production will easily result when there is vertical and Horizontal integration.

Secondly, Mergers and takeovers help the companies emerging from the scheme to diversify their investment as in a case where different companies engaged in different businesses whether within the same industry or not combine their undertakings by way of mergers and Takeovers. The result is that the Company will not depend on one form of investment so that the failure of one of its business will not lead to the failure of the Company itself.

Thirdly, is the need to secure a more efficient management, where the former companies were bedeviled with bad, inefficient, fraudulent or in experienced management, it will enable the new Company come up under a better management team or in the case of a takeover, it will enable a Company with an inexperienced or inefficient management to come under the more efficient and experienced management of the acquiring Company.

Another reason is the fact that the scheme helps to eliminate cut throat competition among competiting Companies within the same undustry. A fierce competition has the effect of sending the weaker companies out of

circulation. Mergers and takeovers enable otherwise competiting Companies to combine their undertakings thereby removing the existing competition. By this they are able as one organisation to take control of the market to their advantage.

Furthermore, in the face of a harsh fiscal or Economic Policy by the government or due to a recession, companies which cannot stand or survive alone may go into Mergers or submit to takeovers and thereby be able to survive and still yield dividends to their owners rather than stand alone and collapse.

At other times, mergers and Takeover become desireable merely for the fact that it is considered that the companies involved may become more viable and yield greater profits then when operated independently. In the circumstance, the operators of the company may decide to reconstruct them by means of either mergers or Take-overs and this is even easier where the different companies involved are owned by the same persons, so that all that is done is to Merge or take over the smaller or weaker Companies and offer equal, or more number of shares in the new company under the new arrangement to the shareholders of the affected companies in exchange

for their shareholding in the affected Companies, or other form of interests like debentures etc in the new Company.

2.8.3 Regulation of Mergers and Takeovers in Nigeria.

S.590 - 613 of the Act has made several provisions regulating the use of Mergers and takeovers as a means of restructuring Companies in Nigeria, however this aspect will be discussed when considering the different procedures for mergers and Takeovers.

Before a Merger or takeover is executed, it must be approved by the Securities and Exchange Commission (SEC)[56].

Section 6(g) of the Securities and Exchange Commission Act, 1988 provides that one of the functions of the Commission shall be the reviewing, approving and regulation of Mergers, Takeovers, (or Acquisitions) and all forms of business combinations in Nigeria.
S.8 subsections (1) and (2) of the said Act provides that, not withstanding the provision of any other law, every merger or acquisition or combination between or among companies shall be subject to the prior review and approval of the Commission and the Commission shall approve any such aforementioned scheme only if it finds it that

such combination is not likely to cause substantial restraint of competition or create monopoly in any line of business enterprise, either in itself or by the use of shares by voting or grant of proxies for that purpose.

S. 8(3) of the same Act however grants exemption to certain combinations from the control of the Securities and Exchange Commission. Such combinations include the acquisition of shares by a holding Company apparently in a would be subsidiary company solely for the purpose of investment only and not for the purpose of using such shares for voting or otherwise as to cause a substantial restraint of business competition or monopoly in any line of business enterprise. Also exempted are transactions duly consumated pursuant to an authority given by any Federal Government owned organisation under any statutory provision vesting such power in the said organisation. To make this regulatory functions of the said Commission effective, the Securities and Exchange Commission Act has imposed a stiff penalty of ₦100,000. fine against any defaulting company and an additional penalty of ₦1,000.ØØ for each day that the default subsists and every director who is also in default is liable to a fine of ₦10,000.ØØ or imprisonment for 3 years or both.

In addition S. 7(1) of the same Act provides that in respect of the sale or trandfer of any Company Securities in which Alliens are participating, approval must be sought from the Commission and No Securities of any Public Company shall be issued sold or transfered without the prior approval of the Commission with respect to the price, time and amount of the sale, e.t.c.
It is submitted that with respect to public Companies, since a merger or takeover will involve the sale or transfer of its shares or other securities the necessary approval must be sought from the Commission with regards to the price, time and amount of the Securities involved in the Merger or acquisition.

The above provisions as are clearly seen are aimed at preventing the extreme adverse effects of business combinations that are characteristic of extreme capitalist Economies, which usually manifest in the forms of dangerous monopolies or undue and deliberate restriction of fair Competition to the detriment of a healthy economic atmosphere for investment.

The need for such regulations can be found in the arguements advanced by J. Olakunle Orojo in his book[57], at pages 428 - 429 where he argues that firstly,

there are possibilities of abuses of the whole process to the detriment of the company and the shareholders concerned, in the form of manipulations of the market price of the shares involved in the scheme, insider trading or dealings, payment of premium to controlling share holders in the targetted Company as inducement, deliberate stultification of facts upon which the shareholders and others concerned may form a reasonable opinion as to whether to assent to the proposed scheme and the conditions thereto or not, etc. The arguement is that since those proposing the proposed scheme are better informed about it than the others, they may deliberately set a stage for it to succeed, of which the others may not possess the prowess to dictate and therefore there is the need for the regulation of such schemes to ensure a healthy Corporate atmosphere for investment and other dealings without fear of being hoodwinked or manipulated.

Secondly, it is in the interest of National Economic Policy and Development to prevent undue restraint on investment or unfair competition or excessive monopoly in business enterprises as this will amount to mortgaging the consumer at the mercy of the producer.

Besides, there is also the need to promote and sanitise a healthy environment for investment and securities

trading without the fear of being manipulated.
It is hoped that when the principles of regulations as provided both in the Companies and Allied Matters Act, 1990 and the Securities and Exchange Commission Act 1988 are fully exploited, the above said Ideals would be reasonably achieved.

2.8.4 Procedure for Mergers

As earlier discussed in our opening discussion on mergers and takeovers, Merger may assume two forms, It is either that two or more companies amalgamating into one of the two or more merging Companies e.g. Re Lipton of Nigeria Ltd[58] where Lipton Nigeria Ltd merged into Lever Brothers Nigeria PLC in 1985 or when John Holt Investments Ltd merged into John Holt Ltd[59], Or the two or more companies amalgamate to form an entirely new company which takes over their Investments e.g. Include when Bendel Line Co. Ltd, Bendel Intra-City Bus Services Ltd and Transkalife Ltd were merged to form a new Company Bendel Transport Services Ltd[60].

The procedure for mergers at present has been developed out of the regulatory provisions provided in the Companies and Allied Matters Act 1990 the Securities and Exchange Commission Act, 1988, and the Guidelines

on Mergers and Acquisitions and Combinations made by the Securities and Exchange Commission, (SEC).

This procedure may be summarised as follows:

2.8.5 Pre Merger Notice

When a merger is proposed, the Management of the Companies involved usually meet in what could be called pre-merger negotiations where they work out an agreement on the terms of the Merger, thereafter they are ready and prepared to proceede with the scheme. Paragraphs 6 and 7 of the Securities and Exchange Commission guidelines for mergers and takeovers requires that the Company concerned gives what is called a pre-merger notice to the Securities and Exchange Commission.

The Notice must reflect the following informations:

(a) Letters of intention to merge signed by the Merging Companies.

(b) A Comprehensive description of the proposed scheme and the feasibility studies done relating to the merger and the justification therefore.

(c) A detailed information on the line of production of both Companies.

(d) A list of the major Competitors in the same line of production as the merging companies, a statement on the Market position of the said Companies and their shares position inclusive of those of the merging Companies.

(e) The structure and organisation of the merging Companies.

(f) Revenue informations about or of the merging Companies.

(g) The latest financial statements of the merging Companies.

(h) An analysis of the effect of the proposed merger on the product market involved in by the merging companies.

After considering the above informations, the Commission will now give its verdict on whether it approves of the scheme for it to be proceeded with or not.

If the proposed merger is approved, the affected companies will proceed to prepare a Formal Merger proposal after due consultations betweeen themselves and their shareholders and professional Advisers such as Lawyers, Accountants, Management Consultants etc. Other

relevant bodies such as the Industrial Development Co-ordination Committee, the Federal Board of Inland Revenue, the Stock Exchange etc are also consulted and after these consultations, a final draft is produced of the proposed merger. This document is usually refered to as the Merger document.

2.8.6 Formal Application Procedures.

After the proposed merger document is prepared, any of the affected Companies may now, pursuant to S. 591 of the Companies and Allied Matters Act, apply to the court in a Summary way by means of an originating summons as required by the rule 2 of the Companies Procedure rules, praying the court for an order to convene and hold separate meetings of the Companies involved as the court may direct.

In making the application, the proposed merger document is annexed for the court to examine.

Where the court is satisfied with the reasons for the application it shall grant the order accordingly, allowing the meetings to be held. If a majority representing three fourths in value of the shares of members, being present and voting either in person or by proxy, at each of the separate meetings approve of the scheme, then

a formal application is prepared by any of the merging companies that is in charge of following-up the merger to see to its successful completion, S. 591(2) of the Companies and Allied Matters Act requires that the said application be forwarded to the Securities and Exchange Commission for its approval again.

Paragraph 8(1) of the Guidelines by the Securities and Exchange Commission require that the said application must contain the following informations:

(a) (i) The terms and conditions of the Merger

(ii) The methods by which it is to be carried out.

(iii) Any resultant amendment or changes to be made in the certificate of incorporation -- and memorandum and articles of associations of the surviving Company, if such a Company were to remain despite the Merger,

(IV) Whether the Certificate of Incorporation of the surviving Company will also serve as the certificate of the Company to emerge after the Merger.

(v) The mode of converting the shares of each constituent company into or in exchange for shares or Securities in the emerging or surviving Company. If there are no such exchanges, then the cash, property, rights or securities they would get in exchange for their shares in the merging or Constituent Company.

(vi) Such other details or provisions as are deemed necessary or Material

(vii) The signature of the respective chairmen of the Board or the Chief Executive of the Companies and Attested by each of the Company Secretaries respectively.

There are several other such informations required[61] When the application has been filed, Section 8(2) of the Securities and Exchange Commission Act provides that in considering the said application, the Commission should bear in mind the statutory standards laid down in the said section 8(2) and the standards stipulated in paragraphs 12 - 17 of the Commission's Guidelines for mergers and acquisitions, which include the following:

(a) The geographical and Market product

(b) The Market shares

(c) The Concentration ratio of (a) and (b) above.

Where the Commission is satisfied with the application, it shall proceed to approve of it.

S. 591(3) provides that, if the Commission approves of the scheme, any one or more of the Companies involved in the scheme may apply to the court by originating summons[62] for the court to also approve of the scheme for it to be implemented. All Companies involved in the scheme must be served for them to appear when the court is to hear the application for approval to proceed with the scheme[63]. S. 591(3) provides that if the court approves of the scheme, it shall thereafter become binding on all the Companies concerned and the court may by the same order with which it sanctioned the scheme or by another subsequent order, make provision for all or any of the following statutory matters:

(a) The transfer to the transferee Company of the whole or any part of the undertaking and of the property or liabilities of any transferor Company under the merger.

(b) The allotting or appropriation by the transferee Company of shares, debentures, policies, or other like interests in that Company / which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person.

(c) The continuation by or against the transferee company of any legal proceedings pending by or against any transferor company.

(d) The dissolution without winding up of any transferor Company.

(e) The provision to be made for any persons who within such time and in such manner as the court directs, dissents from the compromise or arrangement

(f) Such incidental, consequential and supplemental matters as are necessary to ensure that the merger or reconstruction will be fully and effectively carried out.

S. 591 (4) of the Companies and Allied Matters Act provides that, with respect to the order for dissolution talked about in (d) above, the court will not make the order unless two conditions are met to the effect that,

the whole of the undertakings property, Assets or liabilities of the transferor Company have been transferred to the transferee company and that adequate provisions by way of compensation or otherwise have been made with respect to the employees of the Company to be dissolved.

S. 591(6) requires every such Company as is affected by any order made pursuant to S. 591 of the Companies and Allied Matters Act as discussed above to within 7 days of any such order deposit a copy thereof for registration to the Corporate Affairs Commission and also publish in the Gazette and in at least one National Newspaper.
A default attracts a fine of ₦100.ØØ for every Company and Officer thereof who is guilty.

2.8.7 Dissenting Shareholders

Where the Merger has received the final approval of the court for it to be implemented, a dissenting shareholder who does not agree with the whole scheme, must be given an opportunity to decide whether to submit to the scheme or opt out of the entire arrangement. The whole process takes the following shape.
The transferee Company makes an offer to the respective classes of shareholders after the court has given the

final approval for the scheme to be carried out, offering to acquire their shares under the terms of the scheme i.e. by transfering those shares to the transferee Company on the terms agreed under the merger agreement. The respective classes of shareholders have four months within which to express their wishes. S. 592(1) provides that this may be done in their class meetings. Where holders of not less than Nine-tenths in value of the shares of the respective class approve of the offer, The transferee Company has to within two months after the expiration of the said four months give notice in the prescribed form to any dissenting shareholder that, notwithstanding his dissent, it still wishes to acquire his shares if he does not object, then the shares must be acquired under the same terms as those of the other shareholders who had earlier agreed to the acquisition. Where the dissenting shareholder still refuses, he has one month within which to apply to the court to restrain the acquisition bid and order accordingly as to what should be done with the dissenting shareholder's shares, otherwise after the expiry of the one month period after receiving the notice of intention to acquire the dissenting shares, the transferee company shall be bound to acquire

those shares, or where the court throws out the dissenting shareholders application to restrain the proposed acquisition of his dissenting shares, the transferee Company will then send a copy of the notice previously given to the dissenting shareholder to the transferor Company together with an instrument of transfer executed by a nominee of the transferee Company on behalf of the dissenting shareholder.

S. 592(2) requires that where the said instrument of transfer has been executed as aforesaid, the transferee Company will then pay or transfer to the transferor Company the amount or other consideration representing the price payable by the transferee Company for the shares so acquired and the transferor Company will thereupon register the transferee Company as the holder of these shares.

Any such monies or consideration received shall be paid into a separate Bank account and held by the transferor Company on trust for the person or persons entitled thereto.[64]

The problem here is that the act does not tell us who will hold the aforesaid money after the transferor Company has

become totally merged with the transferee Company. However, it is only logical that since the Liabilities and interests or undertakings of the transferor Company are transfered to the transferee Company, it will have to hold the money on trust for the dissenting share holder after the merger has been perfected.

2.9 TAKEOVER PROCEDURES

The procedure for Takeovers is entitely different from that of Mergers. For a Takeover to commence there has to be a takeover bid from the acquiring Company to the target Company. S. 590 of the Act defines a takeover bid as an invitation or offer for the purpose of securing a takeover. From the above definition, it is clear that a takeover bid may also be made by a target Company to proposed acquiring Company.

The procedure for a takeover is very simple, however it would be proper to first consider some specialised aims of which a takeover bid may be intended to achieve.

S. 595(1) of the Act provides that a takeover bid may be made where any of the following purposes are intended.

(a) to acquire shares of any class in an offeree Company which either alone or if combined with shares of that class in the offeree Company,

already on the date of the take over bid are beneficially owned or controlled by that person or persons or any of them, or any Company belonging to the same group as that person or those persons or any of them, would exceed one-third in number of the issued shares included in the class, or

(b) to acquire sufficient shares in the offeree Company to make that Company the subsidiary of that person or, as the case may be of any of those persons, or

(c) to acquire sufficient shares in the offeree Company to enable that person or as the case may be, those persons or any of them to exercise or control the exercise of not less than one-third of the voting power at any general meeting of the offeree Company.

2.9.1 Authority to Make a Take Over Bid

S. 596(1) states that no person or persons jointly or severally may make a take over bid unless prior authorisation has first been sought and obtained from the Securities and Exchange Commission (SEC) refered to as SEC or "the Commission throughout this chapter.

To secure this permission, an application has to be made to the Commission by or on behalf of the person or persons proposing the bid. The application must contain such information as the names and other relevant particulars of the real applicant, all necessary information regarding the proposed bid and such other informations as may be required by the Commission, and where necessary be accompanied by documents or reports as may be prescribed by the regulations stipulated by the Commission. This provision is covered in S. 596(2). Subsection (3) of the same section states that the Commission shall have the power to require further informations from the applicant as would in its view be needed to enable it make a decision on the application and such applicant shall be under obligation to supply the said information unless it is not in his power to do so. In deciding whether to permit the bid or not, the Commission shall be at liberty to consult with other persons as it deems necessary in order to make the said decision.[65]
For the purpose of deciding whether to grant a permit to proceed with the takeover bid or not, the Commission shall have regard only to the likely effects of the takeover bid if successful, on

(a) The economy of Nigeria

(b) Any policy of the Federal Military Government with respect to Manpower and development.[66]

Where the Commission is satisfied with the proposed bid in line with the above mentioned policy directives, it shall proceed to grant the authority for the bid to be proceeded with, and the authority shall last for only 3 months at a time then it lapses, except if the Commission decides to extend the period to such time as it deems fit after an application therefore has been made before the expiry of the original 3 months[67].

After obtaining the Commission's approval to proceed with the take over bid, the proposers shall then make draft copies of the proposed bid, duely signed by or on bahlf of the person or the several persons intending to make the bid either jointly or severally. Before the proposed bid is dispatched, S. 597(1) of the Companies and Allied Matters Act, requires that a copy of such bid must be registered with the Securities and exchange commission else the bidders have no authority to despatch it. The reason for the registration is to enable the Commission ensure that the proposed bid complies with all the relevant provisions of the both the Securities

and Exchange Commission Act as well as the Companies and Allied Matters Act.

If satisfied, the Commission shall proceed to register the bid otherwise it has to reject it, pursuant to S. 597(2). Whichever is the decision of the Commission, S. 597(2) above requires that it has to send notice of either its acceptance or refusal to the person who filed the proposed bid for registration at the address provided by that person when the copy was lodged for registration. Where the notice is one of refusal to register, the Commission shall give reasons for such refusal.

If the affected person is not satisfied with the reasons given, he may within 30 days of service of the notice on him, send notice to the Commission in writing requiring the Commission to refer the matter to the court and the Commiss ion shall do so, and upon such reference, the court may either order the proposed bid to be registered or it may uphold the decision of the Commission not to register the bid, and in that case the Commission shall not register the bid.[68]

2.9.2 General Provisions Relating to the Despatch of the Take-Over Bid.

A take over bid may be made and if it goes through the approval processes may be dispatched to the Offeree Company. Any person, either by himself or through an agent or any two or more persons may jointly or severally by themselves or through their agents make and despatch a take over bid.

A Corporation may also do so, either by itself or jointly with other persons if its board of directors pass a resolution to that effect. The bid may be made from an offeror Company or person or persons to an offeree Company or its shareholders or by a Company to its shareholders as the case may be.[69]

A takeover bid cannot be made to fewer than 20 shareholders or such other number as may be prescribed in the regulations made by the Corporate Affair Commission in order to purchase shares by way of separate agreements or to purchase shares in a company which has fewer than 20, or such other number as may be prescribed in the regulations by the Corporate Affairs Commission or in any other circumstances as the above said Commission may by regulations specify.[70]

A bid cannot also be made where the shares to be acquired are those of a private Company.[71]

2.9.3 Despatch Procedures[72]

Where all the aforementioned procedures have been complied with, the final approved takeover bid is then despatched concurrently to each director and shareholder of the offeree Company and to the Securities and Exchange Commission.

Upon receipt of the bid, the directors of the offeree Company shall prepare a directors circular and send to each of the shareholders of the Company at least within Seven days before the date on which the bid is supposed to expire, or before the 60th day after the date of the take-over bid, which ever is earlier. If the circular is delayed for up to 10 days then the directors must send a notice to each of the shareholders and the Securities and Exchange Commission to the effect that a directors' circular will be sent to them and, therein, may also recommend that no shares be tendered pursuant to the takeover bid until the directors' circular has been received.

The directors' circular is a document issued by the directors of an offeree Company to its shareholders and the

Securities and Exchange Commission. S. 602(6) of the Companies and Allied Matters Act requires it to contain such information as would be of interest to the shareholders in relation to the takeover bid, as specified in the said section and the circular is to be signed by at least one or more of the directors as a true reflection of the recommendations of a majority of them, and where there is a dissenting opinion as to whether the take over bid is fair to the share holders or not, such dissenting view is entitled to be included in the directors circular stating the reasons for such view.

A bidder may decide which and how many shares in an offeree company he wishes to take over.

If the bid is for the whole of the shares of a given class, the bidder must take over any or the shares deposited for take over pursuant to the bid, not later than 60 days after the date of the takeover or they may thereafter be withdrawn by or on behalf of the depositors.

Where the bidder decides to take over the deposited shares, he must wait for at least 10 days after the bid has been made.

The bidder or offeror, if he so wishes may state in his bid that he intends to take over the shares of any dissenting

shareholders who do not accept the bid and that he will be ready to pay the fair value of these shares.

Where the bid is for less than all the shares of a given class or classes of shares, the offeror shall not be entitled to take over the shares deposited pursuant to the bid until 21 after the date of the take over bid and the shares too must be deposited at least 35 days after the date of the bid.

Where the bid is for all the shares of any class or less, the above said procedures shall apply, and in addition any of those shares deposited for takeover may be withdrawn within 10 days after the date of the take-over bid. Shares deposited pursuant to the bid shall if the terms atipulated by the offeror are complied with, that is if he had not waived them, shall be taken up and paid for within 14 days after the last day within which shares may be deposited pursuant to the bid. The maximum period within which shares may be deposited pursuant to the bid will not be less than 21 days after the date of the take over bid. Where there is at any point an amendment to the terms of the take over bid as to increase the consideration offered for the shares, the offeror must pay the increased consideration to each

shareholder whose shares are taken up pursuant to the bid whether or not those shares have been taken up before the said amendment, and if the offeror intends to purchase the shares of the offeree company in the Securities Market, during the period of time within which the shares may be deposited pursuant to the takeover bid, the offeror must state so in his bid.

The shareholders of an offeree Company may accept or reject a takeover bid, However, if 90 percent in number of shares representing the majority shareholding in a given class accept the takeover bid and deposited their shares for or pursuant to the takeover, the bid is deemed to be successful.

2.9.4 Dissenting Shareholders[73]

Where the procedures for the acceptance of the bid by 90 percent of the shareholders of a class or classes of shares have been completed, the offeror may within one month after the date of the acceptance give notice to the dissenting shareholder to the effect

(a) That the take over bid has been accepted by 90 percent of the shareholders of his class.

(b) That the offeror is bound to in the circumstance take up and pay for or has taken up and paid

for the shares of the said con senting share-holders.

(c) That in the circumstance, the dissenting offeree has a choice to make

i) either to transfer his shares to the offeror on the terms on which the offeror acquired the shares of the other shareholders who had accepted the take over bid, or

ii) to demand payment of the fair value of his shares in accordance with Section 609 of the Companies and Allied Matters Act which will be discussed shortly hereafter.

Section 608(3) says the dissenting shareholder upon receiving the above said notice must within 20 days of such receipt make his choice and send notice therebf to the offeror or he is deemed to have decided to transfer his shares to the offeror. Each of the above notices sent out by the offeror to a dissenting offeree must also be sent to the offeree company and to the Securities and Exchange Commission and in the case of the Commission, not later than one month after it has been sent to the offeree.

At the expiry of the said 20 days, if no corresponding notice has been received from the dissenting offeree, the offeror shall proceed to presume statutorily that the dissenting offeree has elected to transfer his shares to the offeror and the offeror shall thereupon pay or transfer to the offeree Company the amount of money or other consideration that the offeror would have had to pay had the dissenting offeree made an election to transfer his shares to the offeror and the offeree Company is deemed to hold that money or consideration in trust for the dissenting offeree and shall pay the amount into a bank account established for that purpose or place the consideration in the custody of a bank for him.

2.9.5 Assessment by the Court:

An offeror may decide to apply to the court to fix the fair value of the shares of the dissenting shareholder if there is a disagreement on it. If he fails to do so, the dissenting offeree may do so after the expiry of 20 days granted the offeror to do so after he has taken over the consenting shares and deposited money with the transferee Company to settle the claims of the dissenting offeree.

Where a dissenting offeree makes the said application to the court all other dissenting offerees must be served with the notice of the court action to appear either in person or by counsel as the decision of court on this issue binds all dissenting offerees.

Once the application has reached the court, it shall hear the parties and there after proceed to fix the fair value for the shares of the dissenting offerees or it may appoint one or more valuers to assist it in fixing the said value and thereafter the offeror will be bound to pay them such fair value as the court had assessed, and such value whether in cash or kind shall be paid to the concerned offerees or the court may order that it be held in trust for them by a person other than the offeree company.

In the foregoing discussions, schemes of arrangements and compromise, mergers and take overs are alternative procedures for dealing with the phenomena of Corporate collapse. By these procedures, the rigidities and rigours of winding up and the attendant risk of not getting anything out of the winding up is removed, so that the Company is gradually steered into a course that would be most benefitial to those concerned.

NOTES AND REFERENCES: CHAPTER TWO

1. Farrar's Company Law; 2nd Ed. Butterworths, London. p. 558.

2. Ibid

3. S. 408(d) and S. 409(a) Companies and Allied Matters Act cap 59 Laws of the Federation of Nigeria, 1990.

4. refer to part xi, Chapter 1 especially sections 350 - 355.

5. Van Horne, Financial Management and Policy 7th Ed. Prentice-Hall Inter'l Ed. P. 741, "Financial Ratios as predictive factors" Empirical Research in Accounting selected studies (Suppliment to Journal of Accounting Research Vol.41, (1966) PP. 77 - 111.

6. For further explanation see Van Horne op. cit pp 468 FF and the Appendix to Chapter 15 of the same book. Also see J. Freear, The Management of Business Finance 1980 (Chapter 14 thereof). Also Farrar's Company Law, op. cit p. 557 i.e. Chapter 558.

7. See Farrar's Company Law, op. cit p. 558, Van Horne, op. cit p. 743 FF, Weston, F. J. and Brigham, E. F. Managerial Finance: Donaldson, E. and Pfah, J., Corporate Finance, Policy and Management, 2nd Ed. (1957 & 1963) Ronald Press Company New York, USA, PP 689 - 698

8. See Business Column, Top Life News Tabloid/Magazine of November 10, 1993.

9. See Farrar's Company Law, op. cit p. 558.

10. See "Daily Champion" Newspaper of 20 May, 1994 at P.2, (News item titled "Failure of business enterprises Explained").

11. Section 27 (2) (a) & (b) of the Companies and Allied Matters Act, 1990

12. See Hunt, P. Basic Business Finance (1958 & 61) Richard D. Irwin Inc. Home Wood, Illinios, USA PP. 583 - 587.

13. S. 408, 409 and 410

14. The statistics presented were culled from Mr. Bashir Gideon's MBA project, Corporate Failure in a Recessionary Economy: The Nigerian Experience, May 1994, submitted to the Department of Business Administration, A.B.U., Zaria in Partial Fulfilment of the condition for the award of Masters Degree in Business Administration, (MBA).

15. S. 209(2) (a)

16. S. 209(2)(b)(ii)

17. S. 209(2)(b)(i)

18. S. 209(1)

19. S. 389 amd 390

20. Section 387 (2)

21. Section 387 (3)

22. Section 180(3) and S. 389

23. Re Braunstein & Majorlaine Ltd (1914) 112 LT, 25 also McMahon V. North Kent Iron Works Co. (1891) 2 Ch. 148.

24. Re Tilt Cove Copper Co. Ltd (1913) 2 Ch. 588

25. Stanfield V. Gibbon (1925) WN 11, also Dipcharima V. Borno Holding Co. Ltd. (1969) NCLR 322, Okoya Others v. Santilli (1990) 2 NWLR Pt 131, 172 at 204 Paragraphs A & C, See also Order 20 rule 1, Federal High Court Rules, 1983.

26. (1913) AC 160 at 167.

27. Re Slogger Automatic Feeder Co. Ltd (1915)1 Ch. 478, also L.P. Arthur Insurance Ltd v. Sisson (1966) 2 All ER 1003.

28. See Sections 394 and 395, Companies and Allied Matters Act 1990

29. Re Magadi Soda Co. Ltd (1925) 41 TLR 297 at 300.

30. See Farrar's Company Law op. cit P. 569.

31. S. 209(1)(a) - (d) and S. 390(1)

32. See Smith, K. and Keenan's Comments in their book "Company Law" 3rd Ed. Pitman Publishing, P. 215.

33. Standared Charteres Bank Ltd v. Walker (1982) 3 All ER 938.

34. (1955) Ch. 634.

35. Section 398 (2)

36. 3rd Edition, Oxford University Press, 1974 p. 173.

36(a) Re Empire Mining Co. (1890) 44 Ch. 402

37. Re Oceanic Steam Navigation Co. Ltd (1939) 1 Ch. 41 or (1938) 3 ALL E.R. 740.

38. Re St. James' Court Estate Ltd (1914) Ch.6

39. Re National Farmers' Union Dev. Trust Ltd (1973)1

40. Yinka Folawiyo & Sons Ltd v. Hammond Projects Ltd. (1977) FRCR 143.

41. See Part viii of the Act dealing with Company meetings and proceedings especially SS. 217 - 223.

42. See S. 233(2)

43. Re Dorman, Long & Co. Ltd (1934) Ch. 635, Re Colmes Iron Co. Ltd. Petitioners, (1951) SC 476.

44. (1972) 1 WLR 1548.

45. (1934) Ch. 635

46. Ibid at page 655 - 657.

47. Re Savoy Hotel Ltd (1981) 3 WLR 441.

48. Gower, Principles of Modern Company Law, 4th Ed. Stevens & Sons London P. 712 FF.

49. (1893) 3 Ch. 385.

50. At page 409 Ibid.

51. Gower, at page 713 op. cit.

52. (1933) 150 Lt at 375.

53. Olakunle Orojo Op. cit p. 426

54. Nokes V. Doncaster Amalgamated Collieries Ltd (1940) AC 1014 or (1940) 3 All E R 549.

55. Re Bendel Line Co. Ltd (1979) F. H.C.R. 19

56. Henceforth and through out our discussion under this heading, references to "the Commission" will mean the Securities and Exchange Commission, See S. 591(2) and (3) and S. 596(1) and (2) of the Companies and Allied Matters Act (Supra).

57. Orojo: Company Law and Practice in Nigeria Op. cit.

58. Suit No. FHC/L/M21/85 decided on 5/6/85.

59. Re John Holt Investments Ltd and John Holt Ltd Suit No. FHC/L/M68/87 decided on 18/5/87. See also Re Chesebrough Products Industries Ltd and Lever Brothers Nig. Ltd. Suit No. FHC/M49/88 decided on 14/11/88 where the former merged with the latter.

60. Re Bendel Line Co. Ltd (1979) FHCR 19.

61. See Paragraphs 8(1) of the Securities and Exchange Commission guidelines for mergers and acquisitions.

62. See Rule 4, Companies procedure rules.

63. See order iv rule 5 (1), Federal High Court Civil Procedure rules.

64. Section 592 (3)

65. Section 596 (4)

66. Section 596 (6)

67. Section 596 (8)

68. Section 597 (3) & (4)

69. See Section 595(1) & (2) and Section 599

70. Section 595 (3)

71. Section 595 (4)

72. The procedures for despatch of a takeover bid as discussed under this heading are provided for in Sections 600, 602, 605, 606, and 608 of the Companies and Allied Matters Act, Ibid.

73. The Procedure for dealing with dissenting shareholders is provided for in Sections 608 and 609 Ibid and the discussion under this heading is drawn from those two sections.

CHAPTER THREE

LIQUIDATION AS A LAST RESORT

INTRODUCTION

We have seen in Chapter Two that even though Companies are formed with the intention that they should grow and expand to yield more profits, they could nevertheless contract and later fail. However before a company should fail, it usually manifests some symptoms of impending collapse. Where such symptoms are discerned on time, measures such as receiverships, mergers, acquisitions or schemes of arrangements and compromise may be employed to combat the phenomenon. These measures with due respect are better alternatives to winding up which in the end only amounts to killing the goose that laid the golden eggs without guarantee of getting any benefits out of the winding up process.

Where however, winding up stands out as the best remedy for taking care of an ailing company, or where for any other reason it is considered just and equitable for the company to wind up, then the winding up option may be considered. The point must also be stated that winding up per se under the Companies and Allied Matters Act, is not stated or projected to be a last resort remedy for creditors and

investors who are caught up in a company that simply refuses to be viable. The fact is that winding up is open to creditors, investors and other concerned persons as an initial as well as a last resort in dealing with an ailing company.

However, where winding up is considered as an option, The procedures laid down in the Act will be followed and the company will be liquidated, its assets collected to settle its liabilities and finally the company is dissolved.

The terms "Winding up" and "liquidation" will be used interchangeably since they mean the same thing in the context in which they are being used here.

3.1 TYPES OF WINDING UP.

There are three types of winding up under the Nigerian Legal System. These are:

(a) Compulsory winding up,

(b) Voluntary winding up, and

(c) Winding up subject to court supervision.

The last one is a hybrid of the other two.
For the purpose of discussing the practice and procedure for the above winding ups, the above classification of

winding up will be re-arranged into two broad headings as follows:

(a) winding up by court order

(b) Voluntary winding up.

Winding up by court order will cover all those conditions under which the court may compulsorily order a company to wind up, while voluntary winding up will also include winding up under court supervision, since the members or creditors first pass a resolution to voluntarily wind-up before either of them later applies to the court to supervise the winding up, so that except for the application for court supervision, the winding up is ordinarily, first a voluntary winding up before it is transformed into a winding up under court supervision.

3.2 WINDING UP BY COURT ORDER

This is also refered to as compulsory winding up. Winding up by court order is the process by which a Company is forced to wind-up by way of a judicial fiat. Once this order is obtained, the Company is forced to wind up and this is irrespective of whether the Company is solvent or not.

3.2.1 Court with Jurisdiction

Since winding up by the court can only be achieved by obtaining a judicial fiat to that effect, the court that has jurisdiction to give the winding up order must be identified.

Section 407 (1)(2) of the Act provides that the court with jurisdiction in this respect is the Federal High Court within whose area of jurisdiction the registered office of the Company to be wound up is located. Registered Office here is used interchangeably to also refer to the Company's Head Office and for the purpose of exercising the jurisdiction to wind up a Company, the registered or head office of a Company shall be the place which has longest been the registered or head office of the Company during the last 6 months preceeding the presentation of the winding up petition. To this end, a person wishing to have a Company compulsorily wound up may come by way of a petititon[1] to the Federal High Court having jurisdiction in the Area where the registered or head office of the Company is situated. This matter of jurisdiction has been re-enforced by the Federal High Court Amendment Decree 61 of 1991 and the Constitution Amendment and Modification Decree 107 of 1993 both of which confers exclusive

jurisdiction on the Federal High Court in respect of Matters touching on the working of the companies and Allied Matters Decree 1990. With the above Amendment to the 1979 Constitution, the touchy issue of the conflict of jurisdiction[2] between the Federal High Court and the State High Courts which have unlimited jurisdiction[3] has been settled, so that the High Courts still retain their unlimited jurisdiction status, but as regards those areas that are conceded to the Federal High Court, the State High Court may not entertain them. One of these areas includes Matters touching on the working of the Companies and Allied Matters Act, 1990 as aforesaid.

3.2.2 Effects of the Commencement of Winding up Proceedings.

Once a Winding up petition has been presented to the Federal High Court it is deemed that winding up proceedings have commenced,[4] and the company's properties, undertakings and interests become a matter of interest to the court so that it is viewed as contemptuous of the jurisdiction of the court to deal with the properties, undertakings or interests of a Company in respect of which there is a pending winding up petition, consequently, once winding up proceedings have commenced, the following consequences

operate as a matter of course:

Any assets, properties or undertakings of the Company including choses in action or shares are prohibited from disposition, transfer or alteration except with the approval of the court. In the same vein, no seque stration, attachment, distress or execution may be levied against the Company or its estate. Where any of the above acts are done or carried out they shall be void and of no effect.[5] The reason is that once a winding proceeding has commenced, the assets of the Company should be preserved so that if a winding up order is given, all those who have claims against the company may prove their claims as creditors and be paid in their order of priority as provided by the Act out of those Assets.

3.2.3 Companies which May be Wound Up Under the Act.

The Companies and Allied Matters Act regulates the affairs of Companies in Nigeria and it requires that all Companies Operating in Nigeria must either be incorporated under the Act or be incorporated in Nigeria prior to the commencement of the Act in which case they are deemed to be incorporated under the Act.[6]

All Companies falling under these two broad headings may be wound up pursuant to the provisions of the Act and in some cases, including the unregistered Company under S. 532 of the Act.

3.2.4 Persons Who May Petition for Winding Up

Section 410 (1) of the Act provides for eight classes of people who may petition for the winding up of a Company, they include the following:

(a) The Company itself.

Section 408(a) of the Act provides in addition to Section 410(1)(a) that a Company may by special resolution, resolve that the Company be wound up and purs uant to this, it may petition for a court order to wind-up.

(b) A Creditor.

Creditors here may be classified into two groups. The actual creditors and the prospective or contingent creditors. An actual creditor is one to whom the Company owes a debt which falls due but remains unpaid even after a demand for payment has been made. A prospective or contingent creditor is one who claims against

the Company for unliquidated money demands i.e. sums which have acrued or are being acrued but which have not been proved or assessed to a fixed sum i.e. payment for goods or services which are being supplied whose prices are to be determined only after the entire supply has been completed or in cases where the price has been fixed but the company becomes liable only upon supply or upon the exhaustion of the utility at the expiry of the time fixed such as rents which become due only at a given or agreed time.

A prospective or contingent creditor may petition only if he could show a prima facie case[7] i.e. that taking into account the financial position of the Company, it will likely be unable to pay the debts it owes him[8]. However, before this petition is heard, the prospective or contingent creditor must give sufficient security for costs to compensate the embarrassment it might cause the Comapny should the petition fail.

(c) The Official Receiver:

Section 419(1) of the Act has specifically designated the Deputy Chief Registrar of the Federal High Court or an officer designated for that purpose by the Chief Judge of the said Court as the Official receiver with respect to the winding up of companies under the Act. Section 410(3) provides that where a company is being wound up voluntarily or under the courts supervision, the official receiver may bring a petition for compulsory winding up against the company and the court may make the order accordingly if it is satisfied that the voluntary winding up or winding up subject to courts supervision cannot be continued with, considering the interests of the creditors and contributories thereof, in which case, the winding up will be converted into and conducted as a compulsory winding up. From the foregoing, it is clear that by implication, the official receiver will have no locus standi to petition directly for compulsory winding up if either of the other two modes of winding up were not already in progress, otherwise there would be no basis for his petition.

(d) A Contributory:

Section 650(1) of the Act defines a contributory as any person liable to contribute to the assets of a company in the event of a winding up. Read with Section 21(1)(a) a contributory when refered to, means a shareholder or member of the company i.e. any person who holds shares in a company and is thereon or thereby liable to be called upon to contibute to the assets of the company to the extent of his liability (if outstanding) on the shares he holds in the company.

However, it should be noted, with due respect, that the definition of the word "contributory" in Section 650(1) is misleading, because if read in conjunction with Section 21 (1)(a) of the Act, it conveys the meaning that only a shareholder who has not fully paid up for his shares at the time of winding up and is therefore liable to contribute that outstanding sum due on his unpaid shares is a member and therefore can petition for a winding up order, to the exclusion of those members who have already fully paid up for their shares, and are therefore not liable to contribute to the assets of the

Company in winding up.

Several judicial authorities have decried this distorted view or definition of a contributory.[9] These authorities have held that reference to the word "contributory" refers to all categories of shareholders[10] since they are in the first instance liable to contribute to the assets of the company and the effects of this liability is only suspended when they have paid up for those shares, but this does not remove their right to petition for winding up. For the purpose of exercising the right to petition for winding up therefore, the proper view is that a contributory shall also include any shareholder who had ceased to be one, within one year of the commencement of the winding up proceedings i.e. the person was a member at least one year immediately before he brings the petition for winding up.[11]

Section 410(2)(a) places some statutory limitations on the right of members to petition for winding up and this is expressed as follows:

A member shall not be entitled to present a petition for winding up unless:

(i) The number of members has fallen below the statutory minimum of two persons.

or (ii) The member's shares were originally alloted to him or have been held by him, and registered, in his name for at least 6 months during the last eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder.

This is to say even the personal representative of a deceased shareholder may petition for winding up if the shares of the deceased devolved on him even if such a personal representative were not registered as a shareholder of the Company.

Section 410(4) provides that a contributory is entitled to petition for winding up irrespective of whether or not there will be assets enough for distribution to members upon winding up. By this provision therefore, it is no longer necessary for a shareholder to show that he has an interest in the winding up in the sense that he stands to gain on the grounds that there will be surplus assets for distribution to members after the creditors have been paid.

(e) A Trustee or Personal Representative

A trustee of either a creditor or a member may also petition for winding up, as well as a personal representative of either of them. A trustee or personal representa-

tive may exercise the right to petition for winding up only in those instances where the benefactor i.e. the member or creditor may also petition.

(f) The Commission:

The Commission here refers to the Corporate Affairs Commission. The Commission may also petition for the winding up of a Company Incorporated in Nigeria by invoking its powers under S. 323 of the Act to bring the petition if based on the report of its inspectors appointed to investigate the affairs of a Company,[12] it finds it expedient in public interest to wind up the Company. Before this petition is brought however, the approval of the Federal Attorney General must first be obtained[13].

(g) A Receiver:

A receiver appointed over the assets or undertakings of a Company may also bring a petition to wind up the Company if the instrument under which he was appointed so provides.

Although this is a statutory provision, a recent English case[14] held that a receiver may however petition for winding up of a Company over whose assets he was appointed receiver, even if the instrument appointing him did not so provide, provided, that in exercise of his

powers to realise the securities of the secured creditors on whose behalf he was appointed receiver, he considers it necessary to petition for winding up of the Company as a means of realising the the said security, then he may petition.

In addition to the above, Section 410(1)(h) provides that all the above said categories of persons may jointly or severally present a petition to wind up a Company.

3.2.5 Grounds for Winding Up By Court Order

Section 408 provides the grounds under which the Federal High Court may entertain a petition for winding up. These grounds are as follows:-

(a) Special Resolution:

Where the Company in general meeting passes a special resolution that the Company be wound up.
When Section 408 is read with Section 457, it will be discovered that the passing of a special resolution to wind up is a ground for compulsory as well as voluntary winding up. The only difference is what happens after the resolution has been passed. If thereafter, the court is petitioned to wind up the Company based on the special resolution passed, then it becomes a Compulsory winding up, if however the members or creditors proceed to appoint

a liquidator as the case may be, to conduct the winding up for them, then the liquidation will amount to voluntary winding up.

(b) Default of Statutory Meeting or Report;

Section 211 of the Act requires that every public Company shall within 6 months of incorporation hold a statutory meeting and deliver to every member entitled thereto, a statutory report certified by at least two directors of the Company or a director and the Company Secretary and also forthwith deliver a copy of the same certified report to the Corporate Affairs Commission for registration.

Failure to comply with this mandatory requirement is a ground for winding up under Section 408 (b).

Section 410(2)(b) requires that a petition for winding up under this ground may be brought only after 14 days of the expiry of 6 months from the date of Incorporation.[15] However the same Section 410(2)(b) grants a discretion to the court to either grant the order if it finds grounds therefore or instead enter an order that the statutory meeting be held and or the report be delivered to the Corporate Affairs Commission for registration as the case may be. Only a member of the Company may present this petition.

(c) Reduction of Membership below two.

Section 93 of the Act requires that a Company should not carry on business for more than six months without at least having 2 members. Section 410 (2)(b)(i) expressly allows a member to petition for winding up where the directors or officers of the Company choose to carry on the business of the Company despite the fact that the number of members has reduced below the statutory minimum of two persons.

(d) Inability to Pay Debts When Due:

Section 408(d) and Section 409(a) - (c) makes extensive provisions regarding this ground for winding up. We will look at the different aspects carefully.

First, for a Company to be deemed to be unable to pay its debts when due, the court hearing the petition must be satisfied that:

(i) There is an undisputed debt pending against the Company.

ii) The debt is due

iii) There has been a demand

iv) The Company is unable to pay within 3 weeks of the demand.

Where the above grounds are proved to the satisfaction of the court, the Company will be wound up.

Certain issues however need further clarification.

The debt pending against the Company must be in excess of ₦2,000.ØØ and must be due to a creditor who has served on the Company a written demand for the payment of the sum by leaving same at the registered or head office address of the Company and for up to 3 weeks thereafter, the Company has failed to either pay up, or secure or compound it to the reasonable satisfaction of the creditor.

Secondly, a Company is deemed to be unable to pay its debts if an execution or other process is issued pursuant to a judgement, decree or order of court in favour of a creditor and the Company is unable to satisfy the said execution levied against it. It is pertinent to note that in the above situation the Act is silent about the minimum judgement sum required, it would be safe therefore to imply that once the execution or levy as the case may be is returned unsatisfied, the Company is legally deemed to be insolvent and as such qualifies for winding up under this heading irrespective of the Judgement sum involved.

Finally, a Company will be deemed to be insolvent, if after taking into account any contingent or prospective liability of the Company, the court is satisfied that the Company is unable to pay its debts.

Winding up under this last segment of insolvency is purely rested on the discretion of the court, so that unless the prospective or contingent creditor first provides security for cost, and proves a prima facie case for winding up, the court will not entertain the petition.[16]

It should be noted that where a Company disputes a debt, the inability to pay that debt cannot constitute a ground for winding up, so that the court must first ascertain the debt and enter judgement therefore before the creditor may thereupon petition for winding up if the judgement debt is left unsatisfied.[17]

The petition for winding up under this ground is in practice, sometimes being brought to court by a creditor as a threat on the Company to pay up or be wound up. Usually, the Company will not dare the risk of being wound up and as such would prefer to explore out of court settlement by arranging to pay the debt. Although this is not the intent of the Legislature, nevertheless it is a legitimate use of the provision[18].

(e) The "Just and and Equitable" ground.

Under this ground, the court has the discretion to decide whether a given set of circumstances complained of but not covered by those grounds provided in Section 408 as discussed above, justify the granting of a winding up order. In this case the court has the discretion to determine what is just and fair in the circumstance, so that if the making of a winding up order is most appropriate, the court will grant it, whether or not, the companies and Allied Matters Act had contemplated that circumstance. This ground for winding up is as distinct as the ones foregoing it and is therefore not to be interpreted ejusdem genesis i.e. that since the just and equitable ground is a general and Omnibus provision it should be interpreted to fit into the specific circumstances contemplated by the Act, since general words are to be interpreted to fit into or follow, but not digress from specific words.
In LOCH V. JOHN BLACKWOOD LTD[19], The House of Lords held that the court's Equitable jurisdiction cannot be limited by interpreting the Just and Equitable ground as being analogus to the foregoing grounds mentioned in the Section.

In the exercise of this equitable Jurisdiction therefore, the courts have held the following as constituting

grounds for winding up under the just and equitable ground.

Loss of Substratum.

Substratum here refers to the objects for which the Company was established to pursue.

Where it is or it has become impossible for the Company to achieve its objects, the Company may be wound up under the just and equitable ground. Objects may be or become impossible to achieve where for example, they were illegal from the onset or became illegal by operation of Law or etc. In RE HAVEN GOLD MINING CO.[20] a company was formed to acquire title to a certain land in New Zealand for Gold Mining purposes, but the title acquired turned out to be defective it therefore became impossible to carry out the object of mining gold on that Land. The Court held that the substratum of the company has failed and so it was Just and Equitable to wind it up.

Loss of substratum may be avoided by incorporating a Company and specifying several objects for it so that even if one fails, the company may carryon the others or the general meeting could alter the memorandum of association of the company to include other objects so that the company may go on.

Impossibility of Carrying on Business.

Here, the objects of the company are capable of being carried out however due to some circumstance, it is impossible to carryon those businesses, examples of such circumstances include situations where there is serious and unresolved dead lock on the board so that it is impossible to carry on the business of the Company.[21]

Oppression, Misconducts and Fraud.

"Oppression" here envisages a situation where the directors or controlling shareholders Jointly or severally use their vantage positions to exploit the minority by depriving them of their rights and or privilages etc.

"Misconduct" envisages a situation where the controllers of the Company are guilty of some form of improper behaviour, bad or improper management so that there is a justifiable lack of confidence in the way and manner the directors are running the Company[22] (but this does not include a misconduct in the running of their private lives).

Where the Company was formed for fraudulent purposes, or without any conceiveable object in mind or where it has no assets base at all e.t.c. the company may be wound up under this ground.as being a fraudulent company set up for fraudulent purposes.

3.3 PROCEDURE FOR WINDING UP BY THE COURT

The procedure for winding up of companies under the Companies and Allied Matters Act, 1990 is governed, by the Act itself and also by the Companies winding up rules 1983 made pursuant to Section 375 of the repealed 1968 Companies Act but adopted under Section 635(1) and (2) of the 1990 Act.

References to the word "rules" hereinafter shall refer to the said Companies winding up rules, 1983 unless otherwise stated.

3.3.1 The Petition;

Rule 15 of the Companies winding up rules requires every petition for winding up to be brought in forms 2, 3 or 4 in the appendix to the winding up rules with such variations as may be necessary. The petition will be set out praying for an order to wind up the company named in the petition as the respondent. The petitioner will also set out in paragraphs (in the petition) the facts or grounds upon which he relies to pray for the order.

The petition will be supported by an affidavit varifying the facts set out in the petition. The affidavit shall be in forms 7 or 8 in the appendix to the rules with such

variations as may be necessary. After the petition has been prepared, it will then be filed with the registrar of the Federal High Court in the area where the registered or head office of the company is located after paying the necessary filing fees as prescribed. This procedure may be followed in filing the petition either by the petitioner himself or his counsel.

After the petition has been properly filed, rule 19 requires that the petitioner shall seek leave of the court to advertise the petition. After the court grants the leave or order, the petition shall be advertised once or as many times as the court may direct. The advert shall be in the Federal Government Gazette and in one National Daily Newspaper and in one other daily newspaper circulating in the state where the registered or head office or last known principal place of business of the Company is located or in such other newspaper as the court may direct.

Before the court grants an order allowing the petitioner to proceed to advertise the petition, the court must look at the petition and satisfy itself that it is bona fide or that it has revealed a prima facie case otherwise the court will dismiss the application or strike it out and

consequently the petition itself becomes useless.[23] However where the court grants the order to advertise, the Advertisement must be done 14 clear days before the date fixed for hearing. The advert shall state the date of the hearing, and the names of the parties and all other information regarding the peitition, with a note that any person wishing to oppose or support the petition may appear on the date of the hearing.

The petition together with a copy of the said advertisement of the petition shall be served on the compny at its registered or head office address or at its last known principal place of business as the case may be, where no such address is known or available, leave of the court may be sought for substituted service, to serve the Company through any of its servants or officers or by leaving the said documents at the last known principal place of business of the Company or by serving it on any other person as the court may direct if it can be shown that by serving it on such a person, the documents will get to the Company and where the company is already being wound up voluntarily, then the liquidator of the Company may be served.[24]

Every Creditor or contributory of the Company who requires a copy of the petition and Advertisement thereof may be

supplied with copies of same by the petitioners' solicitor at least 2 days after the requisition is made provided the requisition was made before the date fixed for hearing and after payment of the prescribed fees.[25]

The winding up of the Company is deemed to commence on the date and time when the petition was presented to the court for hearing or if the Company was already under a voluntary winding up, then on the date the resolution to wind up was passed.[26]

Every person wishing to appear at the hearing of the petition must file a motion giving the petitioner notice of such person's intention to appear, other wise, except by the special leave of the court and upon special and cogent reasons given therefore, the person will not be allowed audience at the hearing. The motion shall be in form 12 as required by rule 23.

3.3.2 Appointment of Provisional Liquidator

After the presentation of a petition to wind up a Company, while the proceeding are going on for the court to decide whether or not to grant a winding up order, if good cause is shown i.e. that the assets of the Company are in jeopardy[27], an application may be made to the court

to appoint a provisional liquidator who will take the property of the Company in his custody and properly manage it pending the outcome of the petition, and since he is only a provisional liquidator, the court may limit and restrict his powers or allow him to exercise all the powers a liquidator may ordinarily exercise in the course of his duties as liquidator. In making the choice of a candidate for the said post, the court may appoint any person it deems qualified for the job or it may appoint the official receiver of the court to act as the provisional liquidator[28]. The provisional liquidator if appointed, acts until a liquidator is appointed, if the winding up order is eventually given, otherwise his duties also cease.

Upon hearing the petition, the court may either grant it or dismiss it depending on the weight of evidence available. However Section 411 provides that a winding up order should not be granted where the court is satisfied that, instead of a winding up order, there is another remedy available to the petitioners as would make it unreasonable to seek a winding up order rather than the enforcement of such other remedy. An example is where the court instead of making a winding up order, decides to order the abatement of an oppressive conduct or where

instead of a winding up order the court decides to order that a statutory meeting be held within a specified time and the statutory report given to the members and registered with the Corporate Affairs Commission. In these circumstances the cost of the petition will be borne by the persons whom the court considers responsible for the default which gave rise to the petition.

However where the court sees just and equitable reasons why a Company must be wound up, it must proceed to grant the order.

Nothing however stops the parties involved to propose to settle out of court on congenial terms, before the winding up order could be granted[29]

Where a winding up order is granted, it amounts to a final judgement on the issue and must be enforced in the manner court judgements are enforced as required by law[30] and persons not satisfied therewith may appeal to the court of appeal for a review.[31]

3.3.3 Effects of A Winding-Up Order.

In addition to the effects that ensue in consequence of the commencement of winding up proceedings which have been discussed earlier, the following effects or consequences also ensue additionally as a result of the making of a winding up order:

No Legal proceedings may be commenced or continued with against the Company except with the leave of the court given on such terms as the court may require.[32]

The winding up order also puts to an end the directors powers of management. This is because, their duties will now be taken over the liquidator appointed to take custody of the Company's assets or where no liquidator has been appointed, then by the official receiver.[33]

The employees of the Company also stand dismissed[34] because the company's life has now been legally brought to an end by the winding up order, what other procedures that are followed thereafter only amount to funeral rites. The liquidator may however retain some of the employees in order to help him complete the winding up and they will be deemed to be in continuous and unbroken employment of the company. Where an employee continues to discharge his duties despite the winding up order and the liquidator continues to pay him his wages, he is deemed to have entered into a fresh contract of service with the liquidator.[35]

The winding up order made by the court is drawn out by the company and a copy sent to the Corporate Affairs Commission for its information and record[36] and thereafter,

Section 512 requires that any document emanating from the Company or it's liquidator, receiver or manager must carry a statement showing that the company is under liquidation, provided such document also carries the Company's name.

3.3.4 Official Receiver

As has been earlier noted, once winding up proceedings have been commenced against a company, the court may make an order appointing a provisional liquidator who may either be the official receiver or any other person.
However, upon making a winding up order, the official reciever or the provisional liquidator takes over or continues to hold the property of the company in his custody until a liquidator is appointed to take over.

3.4 PROCEEDINGS AFTER WINDING UP ORDER.

Section 420 of the Companies and Allied Matters Act provides that, unless the court orders to the contrary, it shall be mandatory that either after the winding up order has been made or after the appointment of a provisional liquidator (that is if one was appointed) one or more of the directors, who were directors at the time of

the winding up order or the appointment of the provisional liquidator and the secretary at that same date, or any officer or officers of the Company as at that date as the official receiver may require, shall submit to the official receiver a statement of the affairs of the affairs of the Company in the prescribed form, verified by affidavit, within 14 days of either the winding up order or the appointment of the provisional liquidator or such extended time as the official receiver or the court shall allow for special reasons shown therefore. The statement is to contain such informations as have been prescribed in Section 420(1) of the said Act.

Any person who writes to the official receiver indicating to be a creditor or contributory of the company shall be entitled by himself or by his agent to inspect the statement and make a copy or extract therefrom.[38]

After receiving the statment of the affairs of the Company, the official receiver must as soon as practicable make a preliminary report to the court according to the requirements of Section 421(1) or where the court had ordered to the contrary that it does not require the delivery of the statement, then as soon as practicable, after the said order submit a preliminary report as afore-

said to the court on the state of affairs of the Company.

The official receiver in making his preliminary report may include his own findings from the statement of the affairs of the company as he deems fit[39] and where the said finding allege any fraud the court shall have powers under Section 450 of the Act to order a public examination of the officials reasonably believed to be associated with the fraud.

After these preliminary procedures as to the preparation of the statement of affairs of the company have been completed and the necessary report made to the court, Section 422 (3)(c) of the Act requires that the provisional liquidator or the official receiver shall, or in the case of any other person so appointed, may summon and hold seperate meeting of the creditors and contributories of the company in his capacity as provisional liquidator or if non was appointed then in his capacity as official receiver to determine who should be appointed liquidator to replace the provisional liquidator, and where, no liquidator is appointed, the official receiver fills the vacancy[40].

The same separate meetings of the creditors and contributories shall also determine, if they so wish whether a

Committee of inspection should be appointed to work with the liquidator, and if so who should be members of the said Committee.[41]

The procedure for these separate meetings is governed by rules 104 - 109 of the Companies winding up rules 1983.

3.4.1 Appointment of Liquidator.

The liquidator is the person who is appointed to conduct the winding up of a Company. He is a very important person and therefore must be appointed as soon as the winding up order has been given by the court.

The first separate meeting of the Creditors and members of the company as earlier noted will have to decide on who should be appointed liquidator. Where both meetings agree on the person to be appointed, then the official receiver will apply to the court for the person named to be appointed by the court.[42]

In practice where the separate meetings disagree on the person to be appointed liquidator, the court will exercise its discretion to appoint a liquidator from either of the candidates suggested by the different meetings or appoint all of the suggested parties recommended by the seperate meetings[43] or any other person the court deems fit, and usually the official receiver is appointed to fill the

vacancy where the separate meetings do not agree on one or more persons.[44]

No qualifications is fixed for the person to be appointed liquidator, However, the Act stipulates that certain persons shall not be appointed liquidators in any winding up. These category of persons are stated in Section 509 of the Act, they include the following:

(a) an infant

(b) a person adjudged to be of unsound mind

(c) a body corporate

(d) an undischarged bankrupt

(e) any director of the Company under liquidation.

(f) any person convicted of an offence involving fraud, dishonesty, official corruption or moral turpitude or of any offences relating to the formation, promotion, management or winding up of a company.

Under the Common Law, it is additional ground for disqualification if it can be shown that the person to be appointed liquidator cannot or is not in a position to act independently or impartially.[45]

If a person other than the official receiver was appointed liquidator, he shall not act in that capacity until he has notified the Corporate Affairs Commission of his appointment and giving security in the prescribed form as may be required by the court.[46]

3.4.2 Appointment of Committee of Inspection.

As aforesaid, the first separate meetings of the creditors and members of the Company decides whether a committee of Inspection should be appointed to work with the liquidator and if so, they also decide who should be the members and how it should be composed, while any differences of opinion between the two meetings on the composition or membership of the committee is resolved by the court. The Committee shall be comprised of such number or proportion of the members or creditors of the Company as may be agreed by both meetings[47].

The function of the Committee is to assist the liquidator in conducting the winding up proceedings to the end. The Committee meets once a month at the instance of the liquidator or any of the members as and when necessary. A quorum is formed by a simple majority being present.

and by the same simple majority of those present, a decision of the Committee is taken.

A person ceases to be a member if he resigns in writing or becomes bankrupt or compoundes or arranges with his creditors or is absent from meetings for five consecutive times without leave or is removed by a simple resolution of the members or creditors as the case may be.

Any vacancy created by the foregoing or other factors, such as death of a member of the committee etc may be filled by the liquidator summoning a meeting either of the creditors or members depending on whose vacancy is created, to fill the said vacancy.[48]

Where no Committee of inspection is appointed the liquidator may apply to the Corporate Affairs Commission for direction, which could otherwise have been provided bythe Committee.[49]

As officers involved in conducting the winding up process, members of the committee of inspection are estopped from buying any part of the company's assets, except with the leave of the court. They shall also not make any secret profits or receive remuneration for their services except as the court shall order.[50]

3.4.3 Appointment of Special Manager

Upon the grant of a winding up order, if the official receiver who is appointed Liquidator whether permanently or provisionally, is satisfied that there is need to appoint a Special Manager to manage the business or undertakings or assets of the Company, he may apply to the court for such appointment and the court shall upon being satisfied as to the need for the special manager, proceed to appoint one, who will be given such powers and duration of tenure as the court may specify.

The Special Manager so appointed shall be entitled to remuneration for his services.[51]

3.4.4 Duties of the Liquidator.

Section 422(1) of the Act provides that the liquidator is appointed for the purpose of conducting the proceedings of the winding up and may also, pursuant thereto perform any such duties as the court may impose.

Before he commences his duties, however, Section 491(1) of the Act requires him to within 14 days of his appointment, publish in the Federal Gazette and in two daily newspapers the fact of his appointment and also deliver to the Corporate Affairs Commission a copy of the notice of his appointment for registration. This requirement

is applicable Liquidator in any of the three types of winding ups.

The duties of the Liquidator are basically as follows:

(a) to take custody and control of the Company's assets, properties and choses in action to which the Company is or appears to be entitled and pursuant to the above may apply to the court to have the said items vested in himself as the Liquidator[52]

(b) to collect and apply all the Company's assets in discharge of its liabilities[53] and the surplus shall go to the contributories in the form of dividends[54]

(c) to apply to the court for the settlement of the list of contributories[55] and make calls on them to pay up any outstanding sum unpaid on the shares held by them, if any[56]

(d) to keep proper books as required regarding the affairs of the Company as the winding up progresses[57]

(e) to have regard to the resolutions of the Committee of inspection and the meetings of the Creditors and members and where there is inconsis-

tency, the resolution of the general meeting of the creditors and members shall prevail[58]

(f) to forward to the Corporate Affairs Commission at least twice a year, a record of the receipts and payments he has made as liquidator,[59]

(g) to send to the Corporate Affairs Commission at such intervals as it shall require, a prescribed statement of the proceedings and position of the winding up, if the winding up had exceeded one year.[60]

(h) where the liquidator is different from the official receiver, then the Liquidator shall furnish the official receiver with such information and allow him access to and facilities for inspecting the books and other documents of the Company and generally give him any aid he requires to enable him perform his duties in relation to the winding up,[61]

(i) to pay into the Companies Liquidation account any surplus from the company's assets after the distribution of the assets, representing unclaimed or undistributed assets, which have remained unclaimed for more than

6 months after the date of their receipt.[62] Upon such payment, the liquidator is to receive a certificate of receipt from the Federal Accountant General.[63]

3.4.5 Powers of the Liquidator.

In order to effectively carry out his duties, the Companies and Allied Matters Act has vested certain powers on the liquidator to be exercised under three major conditions.

First are those powers which he may exercise subject to the sanction of the court or the Committee of Inspection. Secondly, are those which may be exercised without the sanction of the court. Thirdly are these powers which are exerciseable by the court but which have been delegated to the liquidator.

These respective powers will now be enumerated in details.

3.4.6 Powers Subject to Sanction.

The following powers may be exercised by the Liquidator with the sanction either of the court or of the Committee of Inspection appointed to work with him[64].

(a) power to bring or defend any action or legal proceedings in the name of the Company or on her behalf.

(b) power to carry on the business of the Company so far as may be necessary for its beneficial winding up.

(c) power to appoint a legal practitioner to assist him in the performance of his duties as Liquidator.

(d) power to pay any class of creditors in full

(e) power to make any compromise or arrangement with creditors or other persons having or alleging to have any claims against the Company.

(f) power to compromise all calls and liability to calls, debts and other liabilities or all other claims between the company and a contributory or other questions relating to assets or winding up of the company.

(g) power to make calls[65]

3.4.7 Powers Exerciseable Without Sanction.

Section 425 (2)(a) - (h) of the Act confers the following powers on the liquidator to be exercised directly without seeking the leave of the court or of the Committee of Inspection. These powers are as follows:

(a) Power to sell the property of the Company of whatever nature, by public auction or private treaty, with power to transfer the whole or any part of it to any person or Company.

(b) Power to do all acts and execute in the name and on behalf of the Company all deeds, receipts, and other documents and for that purpose, to use the Company's seal.

(c) power to prove, rank, and claim in bankruptcy insolvency or sequestration of any contributory for any balance against his estate.

(d) power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the Company.

(e) power to raise on the security of the assets of the Company, any requisite money.

(f) power to take out letters of administration to the estate of any deceased contributory and to do in his official name as liquidator, any other act necessary for obtaining payment of any money due from the contributory or his estate which cannot conveniently be done in the name of the Company.

(g) powers to appoint an agent to do any business which the liquidator is unable to do himself.

(h) power to do all such other things as may be necessary for winding up of the company and distributing its assets.

3.4.8 Delegated Powers of the Liquidator.

Section 453 (1) (a) - (e) of the Act specifies certain powers of the court which may be delegated to the liquidator to exercise. They include:

(a) power to hold and conduct meetings to ascertain the wishes of the creditors and contributories in winding up.

(b) power to settle the list of contributories and rectify the register of members where necessary and to collect and apply the assets of the Company under the winding up.

(c) power to require the delivery of property or documents to the liquidator

(d) power to make calls

(e) powers to fix time within which debts and claims shall be proved.

Section 453 (2) introduces a proviso to the exercise of the liquidators delegated powers, to wit; that the liquidator shall not suo motu, without the leave of the court rectify the register of members or without the leave of either the court or the Committee of Inspection make any call. That is to say, the aforesaid powers of the court may by rules made pursuant to the said Section 453 (1) delegate the aforesaid powers of the court to the liquidator except that when it comes to rectifying the register of members or making calls, the proviso should be observed.

3.4.9 Status of the Court Appointed Liquidator.

A Liquidator under a Compulsory winding up is appointed by the court[66] and is therefore an officer of the court and as such receives his instructions from the court, and he is subject to the control of only but the court, although his activities, may be checked by the working of the

Committee of Inspection appointed to work with him or by resolutions of the separate meetings of the contributories or creditors and the Corporate Affairs Commission. Any person agrieved by the decision of the liquidator may apply to the court for a review.[67]

As an officer of the court, it fixes his remuneration in accordance with the relevant rules.[68]

The status of the liquidator may be viewed broadly from three angles of agency, trusteeship and as an officer of the court.

As an Agent:

The liquidator is an agent of the Company in so far as he in the course of his duties as such, carries on the business of the Company[69] and he is not personally liable on the contracts he enters into on behalf of the Company since in doing so he acts for and on behalf of the Company.[70] Thus, in the course of carrying on the business of the Company, as an agent he should, exercise due care diligence and good faith in that regard. what is however doubtful in whether the liquidator could be viewed strictly as a true agent since unlike in agency situations, a liquidator in winding up is also the principal i.e. he

controls the winding up.

As a Trustee:

The Liquidator is a trustee of the Company if he in the course of his duties as liquidator applies to the court and is granted custody of the Company's assets or properties in his official name as liquidator.[71] However, it is submitted that even by the mere fact that upon the grant of a winding up order and the appointment of a liquidator who as part of his duties, takes into his custody or control all the properties of the Company and choses in action,[72] he becomes a trustee of the Company in so far as the custody and or control of those properties are concerned. To this end, he owes the fiduciary duty of utmost good faith towards the Company and the Companies winding up rules are very loud on this point[73] so that he cannot make any secret profits from the exercise of his duties as Liquidator or purchase the Company's assets or part thereof without the leave of the court.

This fiduciary obligations of trusteeship extend to the contributories and creditors also so that if the liquidator in his handling of the Company's assets, is proved to have acted in bad faith or to be guilty of any fraud or misconduct

which affects any of the rights of the creditors or contributories in winding up, he becomes liable to them as their trustee[74] since they are the beneficiaries of the proceeds from the winding up.

As An Officer of the Court:

The Liquidator in compulsory winding up is clothed with the status of an officer of the court by his appointment by the court and in that regard he must act within the scope of the powers granted by the court or under the Act and where he is in doubt of what to do, he must apply to the court for directions[75], because he opens himself up to personal liability where he acts ultra vires, and may therefore be summarily dismissed if he acts negligently or in breach of his duties or trust[76].
Thus, because the liquidator in winding up by the court is an officer of the court does not mean he is immune completely from liability.
As seen earlier, when he acts in bad faith or negligently causing loss or injury thereby to a person's rights in the winding up, he is liable to pay damages[76(a)] or where he is in breach of his duties, he will be liable to the creditors or contributories or both, who suffer any injury to their rights as a result of the breach, i.e. where he

makes no provisions for contigent claims of which he had been given notice[77] or where he distributes assets leaving out an entitled creditor[78] and or where he pays a doubtful or unproved claim without seeking proper legal or professional advice.[79] To escape liability therefore the liquidator must exercise a very high standard of due care and diligence in discharging his duties.[80]

3.4.10 Vacation of Office by Liquidator

The liquidator may vacate office after the completion of his job as liquidator, in which case he applies to the Corporate Affairs Commission to be released and if released, he then vacates office.[81]
Alternatively the liquidator may resign from office before the completion of his job as liquidator or he may on good cause shown, be removed by the court and the evacancy thus created will be filled by the court[82] also he vacates office upon death.
Where a liquidator completes his work and the corporate Affairs Commission grants his application to be released pursuant to S. 431 (1) and (2) of the Act, such release operates as a discharge from any liability arising from charge of his duties as liquidator, However, this

discharge is subject to appeal by an agrieved party[83] and to a further condition that it shall not have been obtained by fraud, or suppression or concealment of material facts.[84]

3.5 REALISATION OF THE COMPANY'S ASSETS IN WINDING UP.

The ultimate aim in a winding up proceeding is to distribute the assets of the company to those who had a stake in it i.e. the creditors and the contributories. To achieve this aim, the properties of the Company must be realised i.e. identified and brought under the custody and control of the liquidator[85] for an effective distribution.

The properties of a company in winding up may be realised in five basic ways as provided for in the Act, as follows:

First, in order to facilitate the realisation of the Company's assets, Section 500(1) and (2) of the Act restricts the right of a creditor who issues a writ of execution or attachment against any property belonging to a Company in winding up for any payment for debt due to the Company and who is yet to complete the execution or attachment before the commencement of the winding up proceedings. In such a case he is estopped from claiming or retaining

the benefit of such partial execution or attachment, unless he has completed the execution or attachment prior to the commencement of the winding up.

This restriction applies in a voluntary winding up and operates as soon as the creditor concerned has notice of any moves to wind up the Company, whether or not the resolution has been passed. It is doubtful if this will also apply to a case of compulsory winding up. However it is my view that it will apply. The rationale behind the aforesaid restriction apparently is to preserve the assets of the company which have been caught up by a winding up proceeding so that every creditor will rank paripasu in the proof of their claims and be paid according to their rights or rank. This is to avoid a situation where for example an unsecured creditor will rank in preference to a secured creditor if he is allowed to complete his execution. This may prejudice the rights of other creditors who otherwise would have ranked in preference to him.

It is however doubtful if it could be possible to devest a judgement creditor of the fruits of his victory in a litigation where he had actually completed execution. It may be possible to stop further execution but not

execution that has already been levied pursuant to a lawful court order.

Secondly, to facilitate a smooth realisation of assets in winding up Section 513 (1) of the Act exempts from stamp duties in a compulsory winding up or a creditors winding up any properties or interests of the Company which should otherwise be subject to stamp duty payment before it could be processed or pass any right onto the Company, so that the non payment or inability to pay stamp duties will not prevent the liquidator to realise the said properties or interests towards the winding up.

A third way is the prohibition of fraudulent preference.

Section 495(1) provides that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property which , if made or done by or against an individual would be deemed a fraudulent preference in his bankruptcy shall if done or made by or against a Company be deemed, in the event of its winding up, a fraudulent preference of some of its creditors and therefore be invalid accordingly.[86] Under the Bankruptcy Act 1979 a fraudulent preference is one which is calculated

to give a creditor preference over the others over whom he ordinarily does not have a right of priority.[87]

Where the transaction involves a floating charge, on the assets of the Company, the charge shall not be effective if created within three months of the commencement of the winding up proceedings, unless of course if the Company was solvent as at the time of the creation of the charge or immediately thereafter, but this does not invalidate any payment, made to the Company at the time of creating the charge or subsequent thereto, made in cash in consideration for the charge, so that the Company can benefit from the payment to it, but a recovery of the said sum will only occur if the creditor ranks with the others to claim according to their rights.[88]

Also no properties of the Company in winding up may be conveyed or assigned to the trustees of a class or all of the Company's creditors for their benefit.[89]

All Creditors must rank paripasu in their class of creditors and prove for the payment of their claims.

In another move, there could also be private or public examinations of any contributory, trustee, receiver, banker, agent or officer of the Company or any other person known or suspected to be in possession or capable of giving information about the prospects of the Company with the

aim to require such a one to pay, ~~re~~deliver or transfer such or any other property of the Company to the Liquidator. Any debtor to the Company may also be summoned to produce the money owed. Persons summoned for examination are entitled to a reasonable sum to cover their expenses and where they fail to appear, they may be apprehended by the court to compel their appearance.[90]

Examination here could either be private or public. Private examination is covered under Section 449 of the Act and all it requires is that the court may either order the persons aforementioned to either return the Company's goods in their possession or to supply the information they have that could help the court recover the assets of the Company or the court may require them to appear before it in a private session to examine them under oath or other wise and such examination shall be reduced to writing and signed by the person being examined.[91]

Public examination is usually carried out where the comments or report of the official receiver on the statement of affairs of the Company submitted by the directors[92] of the Company to him had contained the opinion that he suspects fraud by some of the organs or officers or other persons against the Company since its formation, the court may summon any such persons to appear before it on a fixed

date to be publicly examined in relation to the suspected fraud. The public examination shall be under oath and be conducted as in a normal court trial,[93] however, the nature of the trial is inquisitorial. The person is not an accused, the court is only interrogating him with the aim of recovering monies or assets for the purpose of the winding up.

Furthermore, the assets or properties of a Company in winding up may be realised by the conduct of misfeasance proceedings under Section 507(1) of the Act. under this section, the court may by way of summary trial compel an officer or organ of the Company or a liquidator, director, manager etc. whether past or present has misapplied the Company's Assets or monies or misappropriated or converted it or due to a breach of duty in relation to the Company to repay or restore any such money or properties with interest at a rate to be fixed by the court as the case may require or in the alternative be ordered to contribute to the assets of the company to the extent of the persons's liability to the company as the case may be.
Any creditor, contributory official receiver of the company or liquidator may take part in the public examination.[94]

The procedure for the above said application is laid down in rules 51 - 54 of the Companies winding up rules, 1983. Where any occasion for a criminal indictment arises, the court may refer the matter to the Federal Attorney General for Criminal prosecution if he deems it fit as provided under Section 508.

There is yet another method of realising the Company's assets, but this method operates only to preserve and conserve the already realised assets from depletion so as to ensure that genuine creditors get more and enough should remain to reach the contributories.
Section 506 provides that where in the process of the winding up, it appears to the court that any business of the Company had been carried on recklessly or with intent to defraud or for any fraudulent purposes, any contributory, creditor the liquidator or official receiver may bring a petition before the court for an order imposing personal liability on any or all such persons who were party to the said misconduct and that without limitation for all the debts or liabilities of the company incurred in the process of the said miscunduct as the court may direct.[95]
Section 506 (2) allows the court, to direct that if the misfeasor has any debt due from the company, any such personal liability as has been imposed by the court may

be offsetted by the debt due to the misfeasor from the Company, or if the due was a mortgage or charge on the assets of the Company etc the same offseting shall apply.

Not withstanding the aforesaid methods of preserving Company's assets towards a more beneficial winding up, there are cases where the Law allows The liquidator to disown some of its assets where such disclaimer would be more beneficial to the winding up. The provisions of Section 499 (1) allows the company to disown onerous properties.

Onerous properties include such things as Land which is over burdened or saddled with onerous covenants, shares or stocks in Companies which are worthless, unprofitable contracts, unsaleable Assets etc. The Liquidator may with the leave of the court within 12 months after the commencement of the winding up or such extended period allowed by the court disclaim the aforesaid categories of assets or interests in writing signed by him. Where the existence of such property has not come to the knowledge of the liquidator, then he may exercise the right to disclaim any time within 12 months of his becoming aware, unless the 12 months period is extended.[96]

The disclaimer here only operates to divest the Company of any rights liabilities or interests in the disclaimed Assets, but does not affect the rights and liabilities of other persons in the properties or interests disclaimed by the Liquidator.[97]

3.6 THE APPLICATION OF COMPANY ASSETS IN WINDING-UP.

As has been earlier noted, as soon as a Liquidator is appointed his main duty is to realise the Company's assets for the settlement of the claims of those entitled thereto under the winding up. For this purpose, two groups of people are entitled to claim from the Company, they are the contributories and the creditors.

3.6.1 Contributories.

A contributory is any person who is liable to contribute to the assets of a Company in winding up[98] and this includes all present shareholders whether or not they have paid up for all their shares, However, in the event of winding up only those who have not completely paid up their shares will be called upon to pay up.[99] The liability of members

of an unlimited liability company is however unlimited. They must contribute to as much as is required to settle the liabilities of the Com any under the winding up.[100] A past member will also be considered to be a contributory for the purpose of the winding up except that his liabilities abates where he had ceased to be a member for one year or more before the commencement of the winding up[101] and a past member shall not be called upon to pay up the balance due on his shares unless the present members have been called upon to pay and their outstanding contributions were not sufficient to satisfy the creditors in winding up.[102]

3.6.2 List of Contributories.

Section 439 (1) requires that as soon as the winding up order has been made the court shall settle the list of the contributories and usually the court will order the Liquidator to do so[103] the list is required to enable the court or the liquidator with the leave of the court to make calls on shareholders with outstanding Unpaid up shareholding or for the purposes of adjusting their rights in order to distribute the assets to reach every one entitled, the list must be settled unless the court orders to the contrary.

In settling this list, distruction must be made between members as of right and members by virtue of being personal representatives of the original members or as persons liable for the debts of the member concerned.[104]

The list is settled in two parts called the "A" list and the "B" list.

The "A" list consists of the list of persons who were members as at the date of commencement of the winding up and the "B" list consist of persons who were past members who had ceased to be members for one year or more before the winding up commenced.

Where a member whether past or present dies before fulfilling his liability under the shares he held, his estate becomes liable.[105]

However, a past member or his estate shall not be liable if he had ceased to be a member for one year or more and also unless it appears that the present members are unable to the extent of their liabilities to satisfy the contributions required for the Company to meet its obligations.

The order of call is as follows. The share holders who are still liable to the Company under list "A" are first called upon to pay up their outstanding liabilities. This is joined with the Assets realised and the creditors are paid according to their ranks. Where what is realised for distribution is not enough to go round, then calls are made on those liable under list "B". However again, the monies realised from the calls made of contributories under list "B" i.e. past members may only be used to settle the debts the Company incurred while the past members were still members of the Company. They are not liable to contribute generally to the assets of the Company to satisfy creditors who became such only after the past member had ceased to be a member. This is in addition to the earlier stated condition that first a call must have been made on the present contributories who are still liable and that their contributions together with the assets realised are not sufficient to meet the claims of the Creditors. This principle was clearly stated in RE CITY OF LONDON INSURANCE CO. LTD.[106] In that case the Liquidator had made calls on list B contributories and received an amount which exceeded the debts incurred by the Company while the list B contributories were still

members by up to £10,000.00, however the assets realised and the contributions of those under list A was not enough to meet the entire claims of the Creditors. It was held that the £10,000 must be returned to the list B contributories as they were liable to contribute only the debts incurred by the Company while they were still members only and so are not liable for the other debts incurred after they had ceased to be members..[107]

It should be noted that where the shares under list B have been transfered to another person, he becomes liable and if he is a present member as at the time of the winding up he qualifies as a member under list A.

The liability of a contributory is in the nature of a speciality debt which even though it accrues, becomes payable only when demand is formally made.[108]

A member may not set off any dividend or profit due to him from the Company to avoid receiving a call on the sum outstanding on his shareholding but may use such dividend or profit to adjust his rights in relation to debts owed another contributory.[109]

3.6.3 Procedure for Settlement of List of Contributories.

This is provided in rules 63 - 68 of the Companies winding up rules 1983. The Liquidator will serve a notice on the members concerned i.e. those who qualify to be on either list A or B as the case may be, stating the shares upon which calls are to be made, the amount (if any) already paid, amount due for which calls will be made. The notice will contain the date, time and place for the meeting, requiring all those proposed to be placed on the list to appear.

On the date fixed, objections if any will be taken and the final list will be settled, thereafter the liquidator shall send notices to those on the settled list to pay up the amount due from them. The notice shall also inform the contributory concerned that he has 21 days after receiving the said notice to apply to the court to have his name removed, if he has any objections.

The Liquidator may vary this list as and when he deems fit, provided that the same procedure is followed as in the settlement of the list of contributories. Where the Liquidator fails to settle the list of contributories or does so without observing the said procedures, the

affected person may apply to the court by way of summons on notice to have the court determine whether or not the list so settled is proper or whether not the contributories so named in the list are actually contributories within the contemplation of the Law or not.[110]

3.6.4 Procedure for Making Calls.

Under Section 442 and 453 of the Companies and Allied Matters Act, 1990 the liquidator with the leave of the court or sanction of the Committee of Inspection may make calls on the contributories whose names have been settled on the list of contributories.

Rules 69 - 73 of the 1983 Companies winding up rules sets out the procedure for making calls. The call may be made at any time after the winding up order has been made and the list of contributories settled. The Liquidator calls a meeting of the Committee of Inspection giving them at least 14 days before the date of the meeting. The notice shall contain a statement of the proposed amount of the call and the purpose for which it is intended.

The notice of the meeting shall be advert

The notice of the meeting shall be advertised once in at least one National Newspaper. The Advert shall state that any contributory concerned may attend and be heard or he may make written communications in that regard to the liquidator with reference to the calls intended to be made or he may forward the written communication to the Committee of Inspection.

The notice will state the date, time and venue of the meeting and on the appointed date any representations sent shall be heard and those present shall be heard, thereafter the Committee of Inspection shall give their verdict on whether the call should be made or not. The verdict is reached by a simple majority of the members voting either for or against making the proposed calls. Where there was no committee appointed, then the Liquidator shall make the calls with the leave of the court first sought and obtained.

The leave of the court is obtained by the Liquidator applying to the court by way of summons on notice in the prescribed forms stating the amount of the proposed calls and the summons to served on each contributory concerned

at least 7 clear days before the date intended for the call to be made or if the court so direct the notice of the intended call shall be given by way of advertisement in the prescribed format stating the aforementioned informations as in the summons and in this case separate notice will not be sent to each contributory concerned the Advertisement is deemed enough notice. At the hearing, the court will decide whether to authorise the proposed calls or not.

Where either the committee of Inspection or the court has approved that calls be made, a copy of the approval order shall accompany every such call made. A copy of the call shall also be filed with the Corporate Affairs Commission in the prescribed form.

When the call has been made, it may be enforced as if it were a court order or judgement. If the call is made and the contributory defaults to pay up, the Liquidator may apply to the Judge in the chambers by way of summons on notice supported by a strong affidavit of the facts and the judge shall give an order for enforcement.

3.7 CREDITORS.

For the purpose of being entitled to a claim against the Company's Assets in winding up, a creditor is any person who is entitled to a claim against the Company in the form of any debt payable, whether as a present or future due or a contingent or ascertained due or debts sounding only in damages against the Company.[111]

A Company in winding up may be solvent or in solvent. If the Company is solvent, the assets realised are applied to settle the creditors, where the Company is insolvent, a special procedure must be followed in settling the Creditors.

Section 493 of the Companies and Allied Matters Act 1990 provides that where an insolvent Company is under Liquidation, the same procedure used in settling creditors under the Bankruptcy Act shall also apply with respect to such Companies with regards to:

(a) The respective rights of the secured and unsecured Creditors.

(b) Other debts proveable, and

(c) The valuation of annuities, and future and contingent liabilities.

The above said order is as applicable under the bankruptcy Act 1979.

The Creditors will be paid upon prove of their claims in the order stated above and be paid out of the assets available.[112]

Where the assets available, even after calls have been made cannot meet all claims they abate accordingly.

3.7.1 Proof of Claims by Secured Creditors.

A secured creditor was defined in RE ARO CO. LTD[113] generally to include all creditors who hold a lien; charge, mortgage or other encumbering rights over the a ssets or undertaking of the Company as security for debt owed by the Company to such a Creditor. The Secured Creditor need not rank with other creditors to prove his debt. The charge or legal encumberance he exercises over the Company's asset or undertaking is enough proof for him to realise the Credit owed by the Company to him. A Secured Creditor may recover his money in any of the following ways:

First, the secured creditor may decide to surrender his security and prove as an ordinary creditor for his

money, or

He may rely on his security as a full satisfaction of the debt owed him whether or not the security is equal in value with his credit, or

He, where the security realised does not satisfy the claim due, may prove as an unsecured creditor for the balance due.

However, in the event where the secured Creditor chooses to rely on his security for his claims, the liquidator has the option to redeem the security at the value estimated or required it to be sold to satisfy the debt due on the security.

He may also decide to value his security for the liquidator to redeem and if the value estimated is less than the actual claim he may rank as an unsecured creditor for the balance due.

3.7.2 Proof by Unsecured Creditors.

Every unsecured creditor is required to prove his claim before it becomes payable. Rules 74 - 94 of the Companies winding up rules provide the procedure for proving unsecured debts. This procedure is followed in conjunction with the provisions of Section 445 of the

Companies and Allied Matters Act.

The Liquidator or the court will fix a date and time when all creditors may appear and prove their debts or c claims.

To prove a debt or claim, a Creditor will file an affidavit with documents (if any) attached verifying the facts that will establish the debt with the Liquidator who will then be allowed to examine the proofs lodged with him and then decide whether to accept the proof or not, or he may require further proof in other to decide on the genuiness of the claims, whether a claim is admitted or rejected by the liquidator, he must give the creditor concerned notice in writing conveying his decision, and where the decision is that of rejectment, the grounds for the rejection must be stated and any creditor or contributory who is dissatisfied may apply to the court for a review. It should be noted that under the rules dealing with proof of debts, a liquidator also has the power to fix the date, times and venue for proof of debts by following the same procedures aforementioned.

3.7.3 Application of Assets to Creditors

When the assets of the Company have been realised and the Creditors have proved their claims and the list of contributories have been settled, the assets realised will then have to be distributed to meet the various claims against the company.

Section 494(1) states certain debts to be pricrity debts which must be paid in preference to all other debts, however, rule 167 of the Companies winding up rules states that the cost of the winding up shall be paid first i.e. in priority to all other expenses. There are however these preferential debts mentioned in Section 494 (1) which relate to taxes that are due, salaries and wages or allowances of workers of the Company, which the Section 494(1) says should take priority over all other debts.

There is therefore a problem of which payments take precedent? It is humbly submitted that, it is not the intention of the legislature that payments relating to taxes and outstanding wages or dues of workers be paid in preference to the debts incurred in the course of prosecuting the winding up. The proper and better view is that as regards all claims against the Company, outstanding taxes, workers dues etc as mentioned in Section 494(1) shall be paid in

preference to all other claims against the company, except these claims arising out of the prosecution of the winding up, These shall be paid in preference to all other debts in the order specified in rule 167, thereafter, assets remaining may now be disbursed to meet the company's obligations in the order prescribed by Section 494(1).[114] The order for applying the Company's Assets after the costs and expenses of the winding up have been settled will now be as follows:

First, the priority payments mentioned in Section 494(1) shall be paid i.e. outstanding taxes and workers dues of the Liquidated Company, then the secured creditors are settled, in their order of priority. Whatever remains goes to the unsecured creditors in their order of priority. In making the payments in the above said order, the assets realised are used to pay up all the expenses of the winding up, then the preferential payments under Section 494(1), whatever remains is used to pay up the secured creditors in full. Where the assets realised are not enough to go round, then the expenses of the winding up and the preferential payments will be paid and whatever is left will be paid to

the secured creditors and if what is left is not enough to satisfy them, their claims rank and abate equally among themselves in equal proportions.[115]

However, if what is left over, after the preferential debts have paid is enough to satisfy the secured Creditors but not enough to satisfy the ordinary or unsecured creditors, their claims also rank and abate in equal proportions among themselves to the extent the Assets could not satisfy.[116]

Where the Assets are not enough to meet the requirement of the expenses of the winding up or to meet the preferential payments, the security of the secured Creditors may be used to satisfy the cost of the winding up and the preferential debts in Section 494 (1).[117]

Where the assets realised go in to meet all the other claims up to that of the secured Creditors then what is left is to be distributed among the unsecured creditors in the form of dividends declared and this is paid in full if there are enough assets left but where the assets left will not go round, then the said creditors are paid in proportion to their claims and the unpaid part abate accordingly.[118].

3.7.4 Application of Assets to Contributories.

Section 453(1) (1b) of the Act empowers the commission to by regulation made, allow the Liquidator to collect and apply the assets of the Company. Section 446 also confers this power on the court but which could be delegated to the liquidator under Section 453 (1)(1b) of the Act. Any Surplus left over after the Creditors have been paid will be shared out to the contributories as dividend and the court will adjust the rights of the contributories among themselves and make an order under Section 446 of the Act for the distribution of the said surplus among the contributories according to their rank as share holders, the preferential shareholders getting paid before the ordinary share holders so that if nothing is left after the preferential shares have been settled the claims of the ordinary shareholders abate, and where no surplus is left over at all, then the shareholders go without anything.

3.7.5 Unclaimed Dividends or Assets.

Any unclaimed assets which remain after the assets of the Company have been shared shall be paid into the Companies Liquidation Account, and any person claiming to be entitled

thereto may apply to the Corporate Affairs Commission for payment. If the liquidator has been discharged and the Commission is satisfied as to the claim it may make an order for payment accordingly, if the liquidator is however still undischarged, then the Commission will consult him to verify the claim and if satisfied, he shall recommend that the money be paid and the Commission may order for the payment.[119] to

3.7.6 Distribution to Employees.

Section 518 and 649 of the Companies and Allied Matters Act allows a Company before its winding up to make provision for its employees to also benefit from the proceeds of the Company even where the memorandum or articles of the Company did not so provide, provided the Company in general meeting passed the resolution to that effect before the Company was wound up.

However, even where the Company did not pass such a resolution, nor did its articles or memorandum of Association so permit, the liquidator in winding up may exercise the said power of the general meeting and make provision for the employees to benefit from the proceeds of the winding up pursuant to Section 518(2) since the Company's winding up has commenced, and the company can no longer convene its

general meeting to pass the resolution.

Where the Company had already passed a resolution to that effect before its winding up, the liquidator may also carry it out accordingly.

The Liquidator may pursuant to the prior resolution of the members before winding up or in exercise of his powers to make provision for the employees of the Company under Section 518(1)(2), make provision out of the assets of the Company for distribution to the employees accordingly. However, this provision may be made only after all the liabilities of the Company have been liquidated and there remain surplus for distribution to members.[120] Section 518 (3) says that the said provisions for employees may be made out of those assets that are available for distribution to the members because in practice where members pass a resolution before winding up to benefit the Company's employees from the Company's profits, it is out of the profits set aside as dividends that such payments or benefits are given to such employees.

The exercise of the power to benefit employees out of the assets of the Company in winding up may be exercised only with the leave of the court and any Creditor or contributory who is not satisfied with the exercise of this power

by the liquidator may apply to the court for a review.[121]

3.7.7 Completion of Winding Up and Dissolution.

Once the liquidator finishes distributing the assets of the Company, and files the final account of his stewardship, the winding up is said to be completed.
The ideal situation is that winding up proceedings be completed within one year of commencement and if not so completed, the liquidator must notify the Corporate Affairs Commission in the prescribed form giving particulars of the stage and progress of the winding up and a creditor or contributory shall be entitled to examine the said statement of the stage and progress of the liquidation for their information. This statement is to be sent at such intervals as may be required by the court.[122]

After the affairs of the Company have been completely wound up, the liquidator may now apply to the court for the Company to be dissolved and the court shall order for the dissolution of the company and it will be dissolved accordingly. A copy of the order shall within 14 days of the order be forwarded by the liquidator to the Corporate Affairs Commission for it to enter the fact of the dissolution in its books. Failure to comply with this requirement attracts

a fine of ₦25.00 for each day of default.[123]

After the dissolution of a Company, any property and rights whatsoever vested, in the Company or held in trust for her immediately before the dissolution, including unexhausted leasehold but excluding assets or properties held in trust for other persons, shall be deemed to revert to the state as Bona vacantia i.e. ownerless goods under Section 526 of the Act.

Usually when a dissolution order has been made it is final, however certain circumstances may warrant the reopening of the case for the purpose of voiding the order.

Section 524 provides that the court shall have power to at any time within 2 years of the dissolution order upon an application brought before it by the liquidator, creditor, contributory or any other such person who appears to the court to be interested. Where the court is satisfied with the reasons adduced, it may make an order, upon such terms as it deems fit, declaring the dissolution to be void, so that proceedings relating to the winding up may once again be proceeded with accordingly.[124] The person who made the application upon which the order was given shall within 7 days of the order forwards a copy of it for registration

with the Corporate Affairs Commission. Fa ilure of which attracts a fine of ₦25.00 for each day of default.[125]

Under the common law the court may also void its earlier order for dissolution where an unsettled creditor or contributory proves that there was actually a surplus from the Company's assets to meet their claims, which was not applied for that purpose or that Assets were later discovered to be available for distribution or for further distribution.[126]

3.8 COMPANIES WINDING UP ACCOUNT.

Section 527 (1) provides for the existence of an account known as the Companies Liquidation account to be kept on behalf of the Corporate Affairs Commission by the Accountant General of the Federation. The function of this account is to receive all moneys received by the Commission in respect of Companies that are winding up under the Companies and Allied Matters Act.

All payments out of the said account are to be made by the Accountant General[127]. The Accountant General may invest any part of the moneys in that account if in the opinion of the Commission there is enough money to answer the needs

of a Company in winding up or a group of them, so that there is an excess. Upon the recommendation of the Commission, the Accountant General may invest such excess fund in Government Securities to be placed to the credit of the Companies Liquidation Account, but where more money is required of the Companies estate, than was anticipated, the Commission may request for such additional amount as is x needed and the Accountant General shall repay the said money and where it is not available, he must source for it or resell such part of the securities invested in as would be necessary to meet the demand.[128]

The Commission is required to keep separate accounts for each Company undergoing winding up.[129]
The Commission or any of its officers who receives money or fees in relation to the winding up of a Company must make returns and give information to the Accountant General of the Federation in such form as he may require.
The winding up accounts must be audited at the end of each financial year in the manner prescribed by the constitution but before the end of such financial year the Accountant General must prepare a statement of the Account for Audit by the Director of Audit after which it shall be forwarded to the National Council of Ministers.[130]

It is this Account that also receives any Assets of the Company representing unclaimed dividends which should be g held in trust [redacted] those entitled thereto.[131]

3.8.1 Offences Antecedent to OR Relating to Winding Up.

If in the course of conducting the winding up proceedings it is discovered that certain officers, past or present or any member of the Company has Committed an offence in relation to the company whether prior to the winding up or in the course of it, such officer or member may be refered to the Federal Attorney General for Criminal Prosecution at the instance of the Liquidator, the court or any other interested person.[132]

Section 502 - 508 of the Companies and Allied Matters Act outlines the said offences and they range from Fraud to Falsification of Accounts or failure to keep proper Accounts, Fraudulent trading or any other offences relating to companies generally.

3.9 SUMMARY DISSOLUTION OF DEFUNCT COMPANIES.

There are certain Companies which after incorporation have failed to commence business or had commenced business but had already been wound up without notice to the Corporate Affairs Commission.

The Commission is empowered to strike off the names of such defunct Companies from the register of companies and they will be deemed to be dissolved from the date such striking off is gazetted.

There are two conditions provided by the Act under which a company may be summarily dissolved by striking off. These are as follows:[133]

(a) Where the Corporate Affairs Commission has reasonable grounds for believing that a Company is not carrying on business or is not in operation, or

(b) Where a Company is being wound up and the Commission has reason to believe either that no Liquidator was appointed or if appointed, he was not acting or that the affairs of the Company have been fully wound up and the returns required to be made by the liquidator have not been made for up to six consecutive months after the winding up commenced.

The procedure for striking of is as follows:

Where the ground is that of alleged non operation or non commencement of business, the commission may send a letter by post to the Company enquiring whether the Company was carrying on business or in operation at all.

If one month from the date of sending the aforesaid letter elapses without any response, the commission shall again within 14 days after the expiry of the one month period send a registered letter by post to the same company at its registered or head office address or at its principal place of business, making reference to the earlier letter, stating that no reply thereto was received and that if a reply is not received to the second letter within one month from the date thereof, notice shall be placed in the Federal Government Gazette with view to striking off the name of the Company concerned from the register of Companies.

Where the Company replies that it is no longer in operation or carrying on business or where no reply was received at all, the commission may proceed to publish the said fact in the said gazette and send notice to the Company that at the expiry of 3 months from the date of the said notice, the name of the Company will be struck off the register of Companies unless cause is to the contrary. The Company shall be dissolved accordingly, where no such response

is gotten.

Where the ground for striking off is that the Company is being wound up and there is no Liquidator acting or that the affairs of the Company have been fully wound up but without the requisite returns having been made to the Commission as required, within the said six consecutive months, the Commission shall proceed to publish this fact in the gazette and send to the Company or its liquidator (if any) a notice by post that at the expiry of 3 months of the said notice the name of the Company shall be struct off the register of Companies unless cause is shown to the contrary.

In either of the two cases mentioned above, if at the expiry of the 3 months no cause has been shown to the contrary, the Commission shall strike off the name of the Company concerned from the register of Companies and shall publish notice thereof in the gazette aforementioned and upon this publication the company shall stand dissolved, provided however that such dissolution shall not abliterate any liability which a director, managing officer or member would have been subject to had the Company not been summarily dissolved. However, the court has the power to issue a

winding up order for the winding up of the Company despite that its name has been struck off the register of Companies.

Irrespective of the reasons for which a Company has been dissolved, the court has a discretion to consider an application from the Liquidator of the Company or any other interested party, who brings an application before it for the purpose of reversing the dissolution with view to avoid it.

Where the court is satisfied that such an order be made, it shall proceed to give the order declaring the dissolution to be void and thereupon enter a consequential order that any proceedings be taken which ought to, or might have been properly taken had the dissolution not been earlier done.

The application for this order may be made only within 2 years of the date of the dissolution sought to be avoided and the court may grant it upon such terms as it deems fit in the circumstance.

The above said provisions relating to the avoidance of dissolutions have been clearly articulated in Section 524(1) of the Act. Section 524 (2) imposes on the person who was instrumental to the grant of the order, the responsibility to deliver a copy of the said order to the Commission for

registration within 7 days of such order, failure of which attracts a fine of ₦25.00 for each day of default.

3.9.1 Restoration of Company Name After Striking Off.

Section 525(6) exhaustively outlines the procedures for restoring a Company's name to the register of Companies despite having been struck off the said register.

The procedure is as follows:

Any member or creditor who was such as at the date of the dissolution[134] or their attornies or personal representatives[135] who say they are aggrieved by the dissolution may apply to the court at any time before the expiry of 20 years from the date of the dissolution, for an order restoring the name of the Company to the register of Companies.

If the court is satisfied that the Company was actually in operation or carrying on business at the time of the dissolution or otherwise, it is just to restore the name of the Company, the court may make the order restoring the Company and in the circumstance the court may make such other or further order as it deems fit, and in this regard, the court may order that the Company and all other persons concerned be placed in the same or nearly the same position

as they would have been if the Company had not been dissolved when it was. Upon delivery of a copy of this order to the Corporate Affairs Commission, the order shall take effect and the Commission shall register it aaccordingly. In conducting this proceedings, the Company's former Registered or head office address shall be its address for service of process, and the liquidator shall be served at his last known address.

The problem however is where a Company has been summarily dissolved and folded up, it may be impossible to have it restored where all its assets have been shared among members and creditors, who are no where to be found, in which case, it will become practically impossible to restore the name of the Company for the purposes of winding it up or restoring it with view to continueing business.

The order for restoration is not automatic. It is for the court to determine whether, given the circumstances, it is just for the name to be restored,usually unless it is proved that the Company was actually carrying on business or that it was actually in operation, but due to some unforseen circumstances, the respective notices and responses sent between the Commission and the Company some how never

reached either end, in which case it would become mandatory to restore the name of the Company, otherwise it may not be pragmatically possible to restore a dissolved Company which has completely been liquidated.

NOTES AND REFERENCES TO CHAPTER THREE

1. Section 415(2) Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria, 1990.

2. See the case of Savannah Bank of Nigeria Ltd Vs Pan Atlantic Shipping Transport Agencies Ltd (1987)1 NWLR 212 where the Supreme Court held that the unlimited jurisdiction of the State High Courts cannot be fettered, having been confered by the constitution itself, since the constitution was supreme to any other Law.

3. Section 236(1) 1979 Federal Constitution of Nigeria.

4. Section 415 (2).

5. Section 413 and 414.

6. See definition of the word "Company" in Section 650(1) of the Act.

7. Section 410(2) (c).

8. Section 409(c).

9. See Re National Savings Bank Associates (1886) L R, 1 Chan. Appeals 547; Walker and Other Petitioners (1894) 2 SLT 230 at 397; Re - Anglesey Collieries Co. (1886) 1 Ch. Appeals 555.

10. See Pennington, R. R., Company Law Butterworths, London 1979 Ed. p. 681 where the Learned Professor expressed the same views.

11. Section 92(4)(a) read with Section 402 of the Act.

12. Section 314(1) of the Act.

13. Section 410(2)(d).

14. Re Emmadart Ltd (1979) Ch. 540; (1979) 2 WLR 868; (1979)1 ALL E R 599.

15. Read Section 408(2)(b) with Section 211 of the Act,

16. For further clarification, see previous discussion on "Creditor" under the heading "Persons who may petition for winding up" in paragraph 3.2.4 of this work.

17. Saderet Nig. Ltd v. Maiden Electronics Works Ltd. Suit No. FRC/L/M 119/78; Re London & Paris Banking Corporation (1975) LR. 19 Eq. 444.

18. Standard Bank of Nig. Ltd v. Communications Joint Services Ltd (1975) 2 ALR Commercial Series 336.

19. (1924) AC 783 at 788 - 790.

20. (1882) 20 Ch.d. 151 also Re German Date Coffee Co. (1882) 20 Ch.d. 169.

21. Re Yenidje Tobacco Co. Ltd (1916) 2. Ch. 426 (CA) See also Pennington R.R., Company Law, Butterworths, London, 1979 Ed. at p. 692 - 693.

22. Loch v. John Blackwood Ltd (1924) AC 783.

23. Fisher v. Waste Management Ltd. Suit No. CA/L/35/85 judgement delivered on 14/4/87.

24. Rule 17 Companies winding up rules, 1983.

25. Rule 2(d) Ibid.

26. Section 415 (1) and (2) of the Act,

27. Levy v. Napier (1962) S.C. 468

28. Section 422 (2), (3)(a) and Section 419 (1) & (2) of the Act.

29. "Nigerian Acceptances Ltd V. Coutinho Caro & Co. (1974) 6 S.C. 27.

30. Section 455 of the Act,

31. Section 456 of the Act,

32. Section 417 of the Act,

33. Section 422 (3)(b), read with Section 419 of the Act, Ibid also Fowler v. Broads patent night light Co. (1893)1 Ch. 724.

34. Chapman's Case (1866) L R 1 Eq. 346.

35. Day v. Tait (1900? 8 S L T 40 (O.H.)

36. Section 416 of the Act, Ibid.

37. Section 420 read with Section 422 (2)

38. Section 420 (6)

39. Section 421 (2)(3)

40. Section 422 (3)(b)

41. Section 433 (1)

42. Section 422 (3)(c)

43. Section 422 (4)

44. Section 422 (1),

45. Re Medical Battery Co. (1894)1 Ch. 44;
Adebayo v. Official receiver (1954)1 WLR 581 at 685.

46. Section 422 (3)(d)

47. Section 434(1)

48. See generally Section 434(1) - (6) I

49. Section 435

50. Rules 144, 146 and 148

51. Section 436(1) & (2)

52. Section 423 & 424

53. Section 439(1) of the Act and rules 61 and 102,

54. Section 446

55. Section 439(1) of the Act and also in rules 63 - 68

56. Section 442, 453(1) & (2) and rules 69 - 73

57. Section 430; also rules 154 - 155

58. Section 427(1)

59. Section 429

60. Section 516(1)

61. Section 426

62. Section 516(4) read with Section 428(1),

63. Ibid.

64. See Section 425 (a) - (f)

65. Section 453(1) and rule 69

66. Section 422(1)

67. Section 427 (5)

68. See Section 422(6) and rule 142

69. Section 425 (1) (b); Smith v. Lord Advocate (1978) SC 259.

70. Stead, Hazel & Co. v. Cooper (1933)1 KB 840.

71. Section 424

72. Section 423

73.
73. Rules 144 - 145

74. Knowles V. Scott (1891) 1 Ch. 717; also Section 431 (2) Ibid

75. Section 427 (3),

76. Re Duomatic (1969)1 ALL E.R. 161.

76(a) Knowles v. Scott (supra)

77. Re Armstrong Whitworth Securities Co. Ltd (1947) Ch. 673.

78. Pulsford v. Devenish (1903) 2 Ch. 625.

79. Re Windsor Steam Coal Co. (1901) Ltd. (1929)1 Ch. 151 (CA).

80. Re Home & Colonial Insurance Co. Ltd (1930)1 Ch. 102 at 125, Re Wilson Lovatt & Sons Ltd (1977)1 ALL E.R. 274.

81. Section 431 (1) and (2)

82. Section 422 (5)

83. Section 431(2)

84. Section 431 (4)

85. Section 423 and 424

86. Section 49 Bankruptcy Act 1979 LFN 1990

87. Re Goldsmith Exparte Taylor (1886) 18 QB, D. 295.

88. Section 495(1) and 498 of the Act.

89. Section 495(2)

90. Section 449 especially sub-section 4,

91. Ibid.

92. Section 420(1) & (2)

93. Section 421 (1), (2) & (3) also Section 450

94. Section 450

95. Section 506(1)

96. Section 499(1) (2) & (3)

97. Ibid.

98. Section 403

99. Section 92 (4) (c) & (d) also Section 21 (1) (c).

100. Section 21(1)(c) and Section 92 (4)

101. Section 92 (4) (a)

102. Section 92 (4) (b)

103. Section 425 (2)(h) Section 453(1) (b) and rules 63 - 68.

104. Section 439 (2)

105. Section 92 (5) and Section 405 (1) - (3)

106. (1932) 1 Ch. 226.

107. For further details see Rennington, R. R. Company Law op. cit pp. 750 - 752, Orojo, Company Law and practice in Nigeria op cit pp. 499 - 500 and 502, Charlesworth & Cain Company Law P. 653 op. cit .

108. Section 404 Ibid.

109. Section 92 (4) (e) Ibid.

110. Suleiman V. Muslim Bank (WA) ltd (1970) A L R Commercial Series 388.

111. Section 492

112. See Section 32 Bankruptcy Act 1979.

113. (1980) 1 (All E.R. 1087, See also Hallisburys Laws of England 3rd Ed. Para 1321 at p. 668.

114. The same view is apparently shared by Orojo in his book Nigerian Company Law and practice in the 5th paragraph of page 507, see also Section 494(5) ... also p. 663 of Charlesworth & Cain Company Law op-cit

115. Black & Co's case (1872) 8 Ch. Appeals 254.

CHAPTER FOUR

VOLUNTARY WINDING UP AND WINDING UP UNDER COURT SUPERVISION.

INTRODUCTION.

Apart from the drastic option to wind up a Company compulsorily by securing a court order to that effect as discussed in Chapter three of this work, the contributories and Creditors of the Company have two milder alternative forms of winding up provided for by the Act in Chapter Three thereof.

These alternatives are the option to voluntarily wind up the Company or subject the voluntary winding up to court supervision.

Where the contributories i.e. the Company in general meeting pass a special resolution that the Company proceed into voluntary Liquidation, the winding up is said to be a voluntary winding up or liquidation.[1]

However, where the said resolution has been passed for the Company to wind up voluntarily and a petition is brought before the court to supervise the conduct of the winding up, and the court so orders, the winding up is said to be a winding up under court supervision.[2]

In both winding up cited above, the procedings are initiated voluntarily by the Company so that the winding up

is not due to any external intervention, therefore it could be said that both types of winding up are but different species of the voluntarily winding up except that in the case of winding up under court supervision, the proceedings are conducted under the supervision of the court, whereas in the other case, the members or creditors conduct the winding up themselves depending on who initiated the winding up as the case may be. Voluntary winding up therefore could be classified into two broad groups:

(a) Voluntary winding up by members or Creditors i.e. members/creditors voluntary winding up

(b) Winding up subject to court supervision.

Members/Creditors Voluntary Winding Up

Section 457 of the Act provides that a Company may be wound up voluntarily in the following circumstances:

(a) When the period (if any) fixed for the duration of the Company by the articles expires or the event if any, occurs, on the occurence of which the articles provided that the Company is to be dissolved and the Company in general meeting has passed a resolution requiring the company to be wound up voluntarily.

(b) If the Company resolves by a special resolution that the Company be wound up voluntarily.

In subsection (a) above the Act provides for the circumstances under which a Company may pass a resolution to wind up voluntarily i.e. if a life span was fixed for the Company in its articles of association either by way of a time frame or the occurence of a contigent event, then, if such time expires or such contingent event occurs, the members may exercise the discretion to pass a resolution to wind up the Company voluntarily.

However, the question is, what happens where the time frame fixed had expired or where the contingent event occurs, do the members really have a discretion to continue running the Company or must they mandatorily wind up the Company since the continued existence of the Company thereafter would become ultra vires the Company's articles of association? It is respectfully submitted that where such time as stipulated for the life span of the Company expires or the event occurs upon the occurence of which the Company is to be voluntarily wound up, the Company must wind up, because it becomes incompetent thereafter to exist since its articles had stipulated that it be

wound up where the stipulated life span expires and where the company is not wound up voluntarily, any of the persons mentioned in Section 410 (1)(a) - (h) of the Act may petition that the Company be compulsorily wound up on the ground that it is just and equitable to do so[3] since going by the Company's articles it should no longer be seen to be in existence after the expiry of it's life span as stipulated in Section 457(a) Supra. It is therefore in the interest of the members to accordingly pass a resolution to wind up the Company where its life span has expired as provided for in Section 457 supra. Except however, that, where the members are desirous that the Company continue in existence, they must then pass a special resolution altering[4] the articles to remove the clause that stipulated a life span for the company so that it may now enjoy the benefit of perpetual succession like any other incorporated Company.

It should also be noted that where a life span is fixed for a Company and that span expires, should the members be desirous to proceed with a voluntary winding up, all that they require is to pass an ordinary resolution under Section 457(a) which is a mere or simple majority of the votes cast by such members of the Company as are entitled

to attend and vote at the meeting in which the resolution was passed.[5]

Section 457(b) provides that a Company may also be wound up voluntarily where a special resolution is passed to that effect by the Company in general meeting. No qualifying conditions are attached to the exercise of this discretion to wind up a company by way of a special resolution passed to that effect unlike in Section 457(a) where conditions are imposed for the exercise of discretion to wind up by ordinarily resolution.

It follows therefore that a Company may be voluntarily wound up for any or no reason whatsoever provided that the said resolution to wind up was passed as a special resolution. Section 233 of the Act defines a special resolution as one which has been passed by no less than three-fourths of the votes cast by such members as are entitled to attend and vote at the meeting in which the special resolution was passed, of which at least 21 days notice was given, specifying the intention to propose the resolution as a special resolution.

Going by the above analysis one would wonder whether it would not be too dangerous to allow the general meeting to wind up a Company voluntarily for any or no reason

whatsoever on the seemingly mere platter of "three-fourth" majority? Far from being so, a three fourth majority is actually a comfortable zone, If this majority is behind a thing, it is deemed that such a decision is absolute and cannot be faulted because it signifies that of all those eligible and voting only a negligible number is not in support so that the consent or otherwise of such negligible number means little or nothing to the Company in terms of real or imaginable danger. For example, where there are 100 members voting, a three-fourth majority means 75 members voted in agreement as against 25 voting in dissent, this is different from an ordinary or simple majority where even though the majority agree to a thing they may be only a little above the dissenting members in terms of number in which case the dissenting members could equally be nearly as large as the majority as to pose a real danger to the majority i.e. out of 100 members voting it requires only 51 persons to constitute a simple majority as against 49 dissenting in which case the difference between 51 and 49 is only 2, The effect is that 49 is as good as 51, so that where up to 49 persons out of 100 dissent on an issue, it is as good as saying one half of the Company is dissenting. proceeding with such a resolution could be detrimental where the resolution touches on

a very sensitive issue, so that discretion on very sensitive issues is left to a special majority while discretion in relatively trivial issues are allowed on a simple majority basis and where a very sensitive issue is to be decided by a simple majority, then the terms are clearly set out to avoid any possible problem as seen examplified in Section 457 supra where in the case of voluntary winding up by ordinarily resolution,conditionalities were imposed to guide the exercise of the discretion[6] while in the case of voluntary winding up by way of a special resolution no conditionalities are imposed[7] because even if a dissent exists, it would be safely negligible.

4.1 COMMENCEMENT OF VOLUNTARY WINDING UP AND THE EFFECTS THEREOF.

A voluntary winding up is deemed to have commenced on the date and time on which the resolution to wind up was passed[8]. When the resolution to wind up has been passed, it must be advertised either in the Federal Government Gazette or in two daily Newspapers and a notice thereof also sent to the Commission within 14 days of passing the said resolution.[9]

The Act does not specify what type of daily newspaper the resolution to wind up is required to be published in,

unlike in the case of a compulsory winding up which requires the advertisement to be in a National Newspaper and one other local newspaper circulating in the state where the registered or head office of the Company is situate.[10] In order to allow for uniformity and to maintain the spirit in which the publications are required to be made i.e. to bring the winding up to the notice of all and sundry, it would be more proper procedure to also have the winding up advertised in a National Newspaper and at least a local newspaper circulating in the State where the head or registered office of the Company is situate so that even where its shareholders or creditors or other concerned or connected persons are scattered all over the Federation, the said notice via the said mode of advertisement will reach them or at least it could be reasonably believed to have reached them.

Upon the commencement of the winding up i.e. when the resolution to wind up is passed the Company shall cease to carry on business except so far as may be required for the benefitial winding up thereof,[11] so that any business venture that would more likely plunge the Company's assets in jeopardy as to affect the proper conduct of the

winding up to the benefit of all concerned must not be ventured into.

Furthermore, no shares of the Company may be transfered to any other person without the approval of the Liquidator except if the transfer is to the liquidator.
In the same vein, no alteration in the status of the members of the Company made after the commencement of the voluntary winding up shall be valid[12].

In addition to the above consequences, where the winding up is controlled by the members of the Company the appointment of a liquidator automatically amounts to a dismissal of the powers of the hitherto existing board of directors of the Company except where the members in general meeting or the liquidator in the absence of the members, sanctions the continuance of the Board members[13] and in the case of a creditors voluntary winding up i.e. a creditors controlled voluntary winding up, the powers of the board of directors also cease upon the appointment of a Liquidator except where the committee of inspection appointed by them to work with the liquidator approves that the board may continue to function as they may specify, and where no such committee was appointed, then

the creditors may sanction the continuance of the board of directors or otherwise[14].

Voluntary winding up also has the effect of compelling, as a matter of Law, The managers of the Company during the winding up to ensure that the fact that the Company is under liquidation must be stated on every and any document bearing the Company's name, that emanates from the Company its liquidator, receiver, or manager. Usually, the practice is that the words "In Liquidation" is added to the name of the Company specifying the type of Liquidation i.e. if the Liquidation were a voluntary one, any document emanating from the Company or other officers as aforesaid, upon which the name of the Company appears will read, "Say, "Entac Nigeria Ltd "in members voluntary winding up".

As regards the employees of the Company under a voluntary winding up, just as is the case with winding up by court order and under court supervision, the Act is silent.

However, under the Common Law, a voluntary winding up does not for all times operate as a discharge of the Company's employees, depending on the circumstances surrounding the winding up. This is in contrast to the Common Law

position regarding employees of a Company which is under a compulsory winding up in which case all the Company's employees stand dismissed upon the grant of a winding up order by the court.[16]

Where the Company is solvent as at the time of passing the resolution to wind up, the winding up does not operate as a discharge of the employees. They are entitled to be paid their allowances as would have been due,had the Company not passed a voluntary resolution to wind up. This benefit will only ensue if the nature of employment was contractual for a determinable period of time, in which case, the employee will claim his benefits for the unexpired residue of years, weeks or days as the case may be, and if the Company is not able to fulfil her own part of the contract to pay for the remaining period due on the contract, it amounts to a breach of contract or wrongful dismissal for which the employee is entitled to claim his benefits under the breached contract. In Fowler Vs Commercial Timber Co. Ltd[17], by a written agreement F. was appointed Managing Director of C. for a period of 5 years, but before the 5 years expired C. went into voluntary liquidation due to inability to continually meet its obligations. F. too voted for this resolution to wind up voluntarily.

C. counted F. as having been summarily dismissed due to the resolution to wind up the Company and therefore F. had to go without any benefits. The court of appeal held that the voluntary winding up amonnted to a wrongful dismmissal of F. therefore he was entitled to damages by way of payment of his allowances for the unexpired residue or his period of employment on the terms of their agreement.

The court further held that it was wrong to infer that the agreement also implied the condition that should the Company go into voluntary liquidation, its employees stand dismissed.

The ratio in the above case is justified because since the liquidation is voluntary, it should be taken to mean a voluntary and deliberate intention to also breach all contractual agreements outstanding against the Company as at the date of passing the resolution to wind up since the members in a voluntary winding up have a choice either to wind up or not unlike in the case of a compulsory winding up where the Company is forced to wind up by a court order.

Where however, the Company is wound up voluntarily because the Company is insolvent, and there are no funds to settle the employee's claims, it is submitted that they will rank

as actual Creditors and claim for their benefits that have acrued or they rank as prospective or contingent creditors and claim for the unexpired residue of their benefits under the contract of employment for the benefits that could have acrued had the company not by its voluntary resolution resolved to wind up voluntarily.[18] It should be noted however, that where the winding up is to give way for an amalgamation or Merger or Takeover etc, s uch winding up does not operate as a discharge of the Company's employees since the new company resulting from the said schemes or reconstruction will usually absorb the liabilities of the Company that is being woundd-up and this include its employees.

4.2 THE NATURE OF VOLUNTARY WINDING UP.

Apparently, Section 457 of the Act leaves the right to initiate a voluntary winding up to the members in general meeting to pass resolutions to that effect, However, after the resolution is passed, who controls the winding up procedures depends on the financial position of the Company as at the time of passing the resolution to wind up voluntarily.

If the Company was solvent as at the time of proposing the resolution to wind-up a declaration of solvency must be made by the directors of the Company certifying that the Company is solvent, then the winding up will proceed as a members winding up. However where the company as at the time of passing the resolution, is found to be insolvent, or where the Company was forced to wind up due to insolvency, then the members are precluded from controlling the winding up because the interests of the creditors become more paramount. It is the creditors who now face the problem of how to recover their principal and the acrued interest as the case may be. In this case, the winding up is taken over and controlled by the creditors with view to recovering their monies. This latter type of winding up is called the Creditors voluntary winding up.

4.2.1 Members Voluntary Winding up

This type of winding up is dealt with in Section 464 - 470 of the Act. A members voluntary winding up, takes place only when the Company is solvent as at the time of passing the resolution to wind up, in which case the members control the winding up procedures. They appoint their own liquidator and supervise him and therefore have

no need of a committee of Inspection to work with the Liquidator and no meeting of the Creditors is called since the Company is solvent and apparently capable of settling all the Legitimate claims of the Creditors.

To obtain the benefit of securing this type of voluntary winding up, the directors of the Company must bind themselves by making a statutory declaration as required under Section 462 that the Company is solvent and able to meet its obligations within at most 12 months of passing the resolution to wind-up. It is only after the directors make this declaration that the members would have the right to pass the resolution to winding up and conduct it as a members voluntary winding up.

4.2.2 The Declaration of Solvency

Section 462 of the Act requires that where it is proposed by the members to wind up a Company under a members voluntary winding up, the directors of the said Company, where they are only two, or a majority of them where they are more than two may at one or more of their meetings resolve and make a statutory declaration to the effect that, they as directors of the Company to be wound up have made full enquiries into the affairs of the

Company and having done so, are satisfied that the Company is solvent and therefore able to meet its obligations to Creditors in full within a period not exceeding 12 months from the date of the commencement of the winding up. Where the members propose to wind up the company under a members voluntary winding up but no declaration of solvency is made, or where it is made but the period specified therein for paying all the debts of the Company in full exceeds 12 months, the Creditors will have a right to petition the court for a compulsory winding up in which case the voluntary winding up will if the court grants the petition, be converted and conducted as a compulsory winding up[19] or the Creditors may thereafter decide to take-over the winding up proceedings and conduct it as a creditors voluntary winding up, but where they find any difficulty in taking over the winding up due to non co-operation from the members, the creditors may exercise the option to petition for compulsory winding up as aforesaid.[20]

For a declaration of solvency as aforesaid to be effective, it must comply with the provisions of Section 462 of the Act to the effect that:

(a) The declaration must be made by at least two Directors of the Company and if they are more than two, then by a majority of them.

(b) The declaration is made only after the said Directors have made full enquiries and are satisfied from the enquiry of the affairs of the said Company that it is solvent and therefore able to settle its Creditors in full within a maximum period of 12 months from the commencement of the winding up.

(c) The declaration is made within at most 5 weeks immediately preceding the date of the proposed resolution to wind up, and such declaration having being delivered to the Commission for registration within the same period of 5 weeks.

(d) The declaration is accompanied by a statement of the Company's assets and liabilities compiled as at the latest practicable date before the making of the declaration. That is to say, this statement of the assets and liabilities of the Company by implication should be the result of the enquiry required to be made into the affairs of the Company in Section 462(1) of the Act and

which should form the basis for the directors forming an opinion thereafter that the company is solvent and able to pay its debts in full. A Company could be said to be solvent only if the sum total of its assets exceed the sum total of its liabilities, and it is this statement of the assets and liabilities of the Company that will show whether the Company is actually solvent or not as to be eligible to proceed under a members voluntary winding up.

A colosaal duty is placed on the directors to ensure that the opinion of solvency they form is based on reasonable grounds. What is reasonable grounds, the Act does not say, however judging from the provisions of Section 462 (3) of the Act, if the Company is unable to pay its debts in full within the period specified in the directors' declaration of solvency, it shall be presumed that the declaration so made was not based on reasonable grounds. It does not matter whether the Company was able to settle some or most of its debts, what Section 462(3) requires is that unless the debts are paid in full within the specified period, the declaration is deemed not to be based on reasonable grounds. It is therefore safe to propose that where a company is unable to meet it's obligations to creditors in full within the period specified

in the directors declaration of solvency, the Company will be deemed to be insolvent and the declaration so issued will be deemed not to be based on reasonable grounds, unless the directors can prove to the contrary as required under Section 462(3) of the Act.

Any declaration which is not based on reasonable grounds attracts a fine of ₦1,500 or three months imprisonment or both on each and every director that was party to the said declaration.

Another issue arises for consideration here. What the Act requires is that the declaration made by the directors be based on reasonable grounds and reasonable grounds is interpreted to mean that the Company be able to meet its obligation within the specified period, Now, what happens where the declaration was based on faulty findings due to an inadvertant but negligent misinterpretation of facts resulting from the enquiries made into the affairs of the Company to determine if it was solvent or not and it turns out that a truly insolvent Company was mistakenly misrepresented to be solvent, such mirepresentation being made in good faith?

Section 462 is not elaborate on this issue, infact it does not contemplate this issue, however looking at the spirit behind the imposition of penal sanction on any director

who makes a false declaration of solvency, it will be seen that the sanctions are aimed at preventing the directors from colluding with members to issue a false declaration in order to enable the members proceed with the winding up as a members voluntary winding up instead of a Creditors' voluntary winding up or a situation where the directors are equally the members and they issue a false declaration to enable them conduct the winding up as a members voluntary winding up instead of a Creditors winding up, the aim in both cases being to jeopardize the interests of the creditors who would thereby become helpless. It follows therefore that where a declaration turns out to be misleading, if it was based genuinely on mistaken facts or where it was made in good faith believing same to be true, it is doubtful if the penal sanction provided in Section 462(3) of the Act will be Imposed, besides, the Act does not state that the declaration should be the report of an expert opinion as to ladden the directors with the penal sanctions for a genuine mistake which in fact turns out to amount to a violation of the Act. Even though ignorance of the law is not an excuse, judicial authorities on the matter seem to treat such cases with leniency.

In De Courcy v. Clements[21] It was held that the statement of the assets and liabilities of the Company as prepared by the directors being the basis for their declaration of solvency would not be faulted, because it contained errors or omissions which were made in good faith since Section 283 of the English Companies Act, 1948 (which is the equivalent of Section 462 of our Companies and Allied Matters Act, 1990) did not require an absolute perfection in the opinion of the directors as to the solvency or otherwise of the company, provided there is a justifiable ground for their so believing, even though the belief was founded on the wrong facts which were genuinely believed to be correct.

This relaxed position of the Common Law courts is understandable when it is considered that the law has provided adequate protection for creditors who may likely fall prey to a misleading declaration of solvency. If in the course of the winding up the Liquidator appointed is of the view that the Company is unable to pay its debts in full contrary to the declaration of solvency by the directors, he shall forthwith summon a meeting of the Creditors in order to lay before them the proper statement of the affairs of the Company for them to decide on what to do thereafter, whether to petition for compulsory winding up or to take-

over and conduct the winding up as a creditors voluntary winding up. Failure of the Liquidator to comply with this provision amounts to an offence and carries with it a fine of ₦500.00[22] and the creditors will also be entitled to an injunction compelling the Liquidator to comply with the said Section 466 of the Act. It is conceded that the wording of Section 466 conveys the meaning that the Section applies only to voluntary winding up commenced before the enactment of the Companies and Allied Matters Act, 1990 however, it is submitted that the same procedure would apply to a Liquidator of a Company that is under a voluntary Liquidation commenced after the enactment of the said Act.

Furthermore, the creditors themselves may decide to petition for a compulsory winding up where they are not satisfied that the company is solvent as to proceed under a members voluntary winding up.

Prima facie, therefore, once a declaration of solvency has been made pursuant to Section 462 of the Act, if the declaration is not faulted, the winding up now proceeds as a members voluntary winding up, thereafter a meeting of the company is called and a resolution is passed to wind up the company to that effect under Section 457.

4.2.3 The Liquidator in Members Voluntary Winding Up.

At the general meeting of the Company where the resolution is passed to wind up the company or at a subsequent meeting one or more persons will be appointed as liquidators for the Company.

Upon his appointment, the members shall fix his remuneration.[23]

Where the members do not or are unable to agree on who should be the liquidator or liquidators, the court reserves the right to upon the petition of any member of the Company or other concerned persons appoint a liquidator for the Company and in the same vein the court reserves the right to fire a members appointed liquidator in a voluntary winding up where good cause is shown and the court may appoint another liquidator to replace him.[24]

Upon his appointment the liquidator shall within 14 days thereof publish the fact of his appointment in the Federal Government Gazette and in at least 2 daily newspapers and also within the same period deliver a notice of his appointment to the Commission for Registration.[25]

4.2.4 Types of Meetings During a Members Voluntary Winding up.

During the pendency of a members Voluntary winding up, several meetings are held pursuant to settling issues that arises therefrom. These meetings are as follows:

(a) Meeting on discovery of Insolvency;-

After the commencement of the voluntary winding up and a Liquidator is appointed, if the Liquidator is of the opinion that the declaration of solvency made by the directors of the Company pursuant to Section 462 was not the true position of the company, i.e. where he is of the view that the company will not be able to pay its debts in full within the time specified in the declaration, Section 466 requires the liquidator to forthwith summon a meeting of the Creditors and lay before them a statement of the assets and liabilities of the Company for them to decide whether to take over and continue the winding up as a Creditors Voluntary winding up or to petition for a compulsory sinding up.

(b) End of Year Meeting[26]: Where a Voluntary winding up continues beyond one year, the Liquidator shall summon a general meeting of the Company at the end of that year counting from the date of the resolution to wind up and

at the end of each subsequent year, the meeting should be summoned within 3 months, to the end of each such subsequent year, . The Commission may however at its discretion allow such further or longer time within which the meeting should be summoned at the end of each year.

The purpose of this meeting is for the liquidator to lay before the meeting an account of his acts and dealings in relation to the conduct of the winding up proceedings during each preceeding year that the winding up lasts.

(c) Final Meeting: As soon as the winding up proceedings are completed but before the Company is dissolved, the Liquidator must unless he had called a meeting of the Creditors under Section 466,[27] and handed over the winding up to them, summon a meeting of the members for the purpose of laying before the meeting an account of the winding up, showing how it was conducted, and how the property of the Company was disposed of and giving any other or further explanations as may be necessary.[28]

Section 468(2) provides the procedure for calling this meeting. The liquidator shall publish in the Federal Gazette and in some newspapers printed and circulating

within Nigeria in the locality where the meeting is being called, the notice of the said meeting specifying the time, place and purpose of the meeting.
The said notice is to be published at least one month before the meeting is to be held[29].

The Liquidator is required to send to the Commission for registration within 7 days after the holding of the meeting, a copy of the statement of account of the conduct of the entire winding up. The copy is to be accompanied by a return made by the Liquidator to the effect that the Final meeting of the Company was duly held on a given date, provided that where the meeting was not held because no quorum was present then the Liquidators return shall state this fact and it will be deemed that the requirement to hold a final meeting to give account of the conduct of the winding up was complied with.[30]

4.2.5 Dissolution Under Members Voluntary Winding Up.

After a copy of the statement of the account of the conduct of the winding up proceedings and the returns mentioned in paragraph 4.2.4(c) have been sent to the Commission as required by Section 468 (3) of the Act for registration, at the expiry of 3 months after such

registration the Company is deemed to be dissolved.

At the expiry of the said 3 months, the Company becomes dissolved by operation of Law, so that no further action is required to be taken to have the Company dissolved. It is submitted therefore that the Commission may thereafter without recourse to anybody, not even to the Company itself, proceed to strike of the name of the Company from the register of Company.

The proviso to Section 468 (4) of the Act provides that the court may exercise the discretion to defer the date of the dissolution upon the application of the Liquidator, or of any other person who appears to be an interested party, and where such discretion is exercised, the court shall fix the deferred date on which the dissolution is to take place.

The person who obtains the said order is required to deliver a copy thereof to the Commission for registration within 7 days of the order. Failure to do so attracts a fine of ₦20 for each day of such default.[32]

A dissolution may be avoided or reversed by the court if an application for that purpose is brought before the court within 2 years of the dissolution the procedure for this has been discussed earlier in chapter 3 ante[33].

4.3 CREDITORS VOLUNTARY WINDING UP.

A Voluntary winding up may proceed as a Creditors voluntary winding up in the following cases:

(a) where it is proposed to wind up a company voluntarily but no declaration of solvency is made by the directors as required under Section 462 (1) of the Act.

(b) where a declaration of solvency has been made but upon appointing a liquidator to conduct the winding up, he forms the opinion that the Company is not really solvent as to be able to pay up its debts in full.[34]

In the case of the position in paragraph (a) above, the Company must summon a creditors meeting to hold on the same date that the members are proposing to pass a resolution to wind up or on the following day thereof for the Creditors to take over and conduct the winding up.

In the case of the situation in paragraph (b) above, the Liquidator of the Company is to forthwith after forming the said opinion summon a meeting of the creditors and lay before them a statement of the assets and liabilities of the Company thereafter the creditors will have to decide whether to pass a resolution to wind up the Company under a creditors voluntary winding up or to petition for

a compulsory winding up. Where the Creditors choose the former option, then the winding up proceeds as a Creditors voluntary winding up but where they choose the latter option then the winding up proceeds as a Compulsory winding up. However, where no declaration of solvency is made to certify that the Company is solvent as to proceed under a members voluntary winding up, the Company after summoning a meeting of the Creditors as aforesaid one of the directors of the Company will preside over the meeting and lay before the creditors a statement of the actual financial position of the Company, with a list of the creditors of the Company and the estimated amount of their claims. At this meeting the Creditors will have to decide on whether to go on with the winding up as a creditors winding up or to petition the court for a compulsory winding up. Where they propose to continue the winding up as a Creditors voluntary winding up, they will then proceed to appoint a liquidator[35] and a Committee of Inspection[36] to work with him at the same or a later meeting called for that purpose.

Before the Creditors pass their own resolution however; it will be required that the members first pass the resolution to wind up the Company[37] and they will stop there and thereafter the meeting of the creditors summoned

as required under Section 472 (1) will take over the proceedings.

To summon the said Creditors meeting, Section 472(1) and (2) requires that notices of the meeting be sent by post to the Creditors simultaneously with the notices sent out to the members to attend the meeting wherein it is proposed to wind up the Company. The notice is to be published in the Federal Government Gazette, once, and in at least two newspapers printed in Nigeria and circulating in the locality where the registered or head office or principal place of business of the Company is situated.

4.3.1 The Liquidator in Creditors Voluntary Winding Up.

As has been earlier noted, once it is proposed to wind up a Company voluntarily and no declaration of solvency is made by the directors, the winding up so proposed shall continue as a creditors voluntary winding up and therefore the creditor will take charge of the winding up and proceed to appoint a liquidator to conduct the winding up for them.

The provisions applicable to a liquidator in members voluntary winding up also apply to a liquidator in Creditors voluntary winding up.

4.3.2 Committee of Inspection

After the Voluntary Winding Up is taken over by the Creditors in the circumstances earlier discussed in paragraph 4.3 and Section 474 (1) of the Act allows the creditors to also appoint a committee of Inspection consisting of no more than 5 members. The Committee is to be appointed at the meeting of the Creditors which was held pursuant to Section 472(1) of the Act i.e. their first meeting or at any subsequent meeting of the creditors. Under the same Section 474 (1) of the Act, the members in general meeting may also appoint not more than 5 persons to serve on the committee along with those persons appointed by the creditors unless if the creditors veto the exercise of this privilege by the members.

However, the members may petition the court to if it deems it fit, give an order allowing some of the nominees of the members of the Company or any other persons to serve on the Committee as members.[38]

As regards the functions, powers or duties or meetings etc of the committee, Section 474 (2) of the Act provides that they shall be the same as those of the committee of Inspection under a compulsory winding up by court order.[39]

4.3.3 Meetings of Creditors:

As regards the meetings to be held by creditors in voluntary winding up, the same meetings are applicable as in members voluntary winding up.[40]

4.3.4 Dissolution in Creditors Voluntary Winding Up.

The same procedures as in dissolution under a members voluntary winding up also apply.[41]

4.4 POWERS OF A LIQUIDATOR IN VOLUNTARY WINDING UP REQUIRING SANCTION.

The underlisted powers may be exercised by a liquidator in a voluntary winding up, by the sanction of the members given by way of a special resolution of the Company (if the winding up were a members voluntary winding up) and where it is a Creditors voluntary winding up it will require the sanction of the committee of Inspection or of the court or where there is no Committee of Inspection, then of the meeting of the Creditors.[42] These powers requiring sanction before they are exercised are as follows:

(a) Power to pay any classes of Creditors in full.[43]

(b) Power to make any compromise or arrangement with Creditors or persons having any claims against the Company[44].

(c) power to compromise all calls, debts and all claims between the Company and a contributory and all questions relating to the assets or the winding up of the Company and take security for the discharge and give a complete discharge in respect thereof.[45]

4.4.1 Powers Exercised without any Sanction:

The liquidator in voluntary winding up may exercise certain powers without first obtaining the sanction of the court or of the Committee of Inspection or of the Creditors if the winding up is a creditors voluntary winding up or of the members of the company in general meeting as required by Section 481 (1)(a) of the Act. Section 481(b) of the Act says these aforesaid powers requiring no leave include any of the other powers granted by the Act to the Liquidator in compulsory winding up, except these powers which Section 481 (1)(a) says must be exercised with the necessary sanctions. In effect therefore, a liquidator in a voluntary winding up by Section 481(1)(b) of the Act may without sanction exercise any of the powers given by the Act to a liquidator in a compulsory winding up by the court, apart from those which

Section 481(2)(a) of the Act says will require leave to be exercised by the liquidator in voluntary winding up. It follows therefore that a liquidator in a voluntary winding up does not require leave from any body to exercise all the powers which a liquidator in a compulsory winding up would require leave, in addition, he may exercise also those powers which the liquidator in compulsory winding up may exercise without leave, with the exception of those powers specified in Section 481 (1)(a) of the Act which specifically require leave. He may also exercise those powers of the court which have been delegated to a liquidator in compulsory winding up[46].

In addition to the above, a liquidator in voluntary winding up may exercise the under listed powers without sanctions[47]:

(a) power to settle the list of contributories.

(b) power to make calls

(c) power to summon general meetings of the Company for the purpose of obtaining the sanction of the Company by special or ordinary resolution or for any other purpose.

4.4.2 Duties of the Liquidator in Voluntary Winding Up.

The primary duties of the liquidator, here are generally the same as those of a liquidator in compulsory winding up with only such variations as to ensure that the interests of the creditors and members are protected. However, these duties normally include the duty to collect the assets of the Company, pay up the cost of the winding up and other priority debts as required by Section 494 of the Act, then distribute the remaining assets (if any) to the contributories, unless the articles provide other wise as stated in Section 480 of the Act. Since the liquidator in voluntary winding up is appointed either by the members or the creditors as the case may be he is their agent and therefore personally liable to them for any breach of his duties.

4.5 REALISATION OF THE COMPANY'S ASSETS IN VOLUNTARY WINDING UP.

The discussion on the realisation of the Company's assets in voluntary winding up is the same as that applicable under a compulsory winding up.[48]

4.5.1 Application of Company's Assets in Voluntary Winding Up.

The discussions on the application of Company's assets in compulsory winding up also applies to voluntary winding up[49].

4.6 COMPANY'S BOOKS IN VOLUNTARY WINDING UP.

The liquidator is required to keep books on the conduct of the affairs of the Company during the winding up and these books shall be evidence of what happened during the winding up proceedings. The books are to be kept in conformity with Section 470 of the Act. If the winding up was a members voluntary winding up the liquidator is to keep books, and where it is a creditors voluntary winding up, the books will be kept as the committee of Inspection appointed by the creditors shall direct but where no such Committee was appointed, then as the Creditors shall direct.[50]

These books as are kept shall be prima facie evidence of the truth of all matters therein contained as between the Company and the contributories[51]. It is respectfully submitted that if the contents of the books as are kept under a members voluntary winding up is prima facie

Evidence of the truth of its contents, then the same applies to books kept under the direction of the creditors or the Committee of Inspection under a creditors voluntary winding up.

When the winding up is completed and the Company is about to be dissolved, the members or the creditors (or the Committee of Inspection appointed by them) may direct on how the company's books should be disposed of and this include with due respect the books of Account of the winding up as well as other books of the Company, going by the construction of Section 515(1) of the Act.

However, where the books are not disposed of no liquidator or any other person who had custody of the said books may be held liable to produce same after five years of the dissolution of the Company.[52]

However, taking into cognisance the fact that a concerned party may apply to the court after no more than two years after the dissolution for the court to set aside the dissolution, and if so set aside, a consequential order will be entered enabling the company to continue as if it was never actually dissolved, and thereupon proceedings may be taken as might have been taken had the company not been dissolved[53], it is too damaging for the Act to allow the

Creditors or members to direct as to how the books may be disposed of, because if they so direct that it be disposed of immediately before or after the dissolution, then such provisions as to reversal of dissolution earlier mentioned will be frustrated and rendered nugatory as there would be left no records about the company for any proceedings to be taken after the dissolution has been reversed or avoided.

The purport of Section 525(6) of the Act on the restoration of the Company 20 years after striking off the register of Companies will also be frustrated by the disposal of the Companies books. It is therefore not enough for Section 515 (3) to state that the Corporate Affairs Commission may make general rules as to enable it prevent the destruction of Company books for a period not exceeding 5 years after dissolution. The Act ought to have gone ahead to make a provision preventing the destruction of the Companies books before 5 years of the dissolution, so as to give it the force of law rather that saying the prevention should be by way of general rules as the Corporate Affairs Commission might think fit. The proper thing in fact was for the Act to have outrightly prohibited the destruction of the company's books and rather made

a provision that the books be kept as a permanent record of the affairs of the ~~x~~dissolved company to be kept as a public document. This will make it easier for a concerned party to exercise his rights of applying for a restoration of the Company within 20 years of it being struck off the register of Companies as provided in Section 525(6) of the Act or for avoiding the dissolution by reversing it as provided in Section 524 of the Act.

4.7 POWERS TO MAKE - APPLICATIONS TO THE COURT FOR DIRECTION.

Section 483 of the Act allows the liquidator, a contributory or creditor to apply to the court to determine any issue or question arising in the winding up proceedings or for the court to exercise any of the powers which the court may exercise had the winding up been a compulsory winding up. To this end, the fact that either the members or the creditors as the case may be are incharge of conducting the winding up does not oust the jurisdiction of the courts to intervene when ever it is called upon to do so. This provision is also a welcome protection for any of the persons specified in Section 483 as aforesaid to apply to the court to determine some issues for which he was suppressed or refused audience during the winding up

proceedings, probably because he was in the minority or so. As for the Liquidator, this provision provides him with the same rights as a Liquidator under a compulsory Winding up, so that by the said Section 483, he may now freely apply to the court for direction on matters which he is not clear of or where there is a disagreement between him and his appointors.

4.8 CONVERSION OF VOLUNTARY WINDING UP INTO COMPULSORY WINDING UP.

A member or creditor of a company which is under a voluntary winding up may at any stage of the voluntary winding up petition for the voluntary winding up to be continued as a compulsory winding up. As regard the Creditor and the Company, he is entitled ex debito Justitiae to an order for compulsory winding up, this right is re-enforced by Section 485 which says the fact that the Company is already under a form of liquidation does not bar the right to petition for a compulsory winding up[54]. However, it is submitted that this right is neither absolute nor to be exercised in isolation by individual creditors. The wishes of the majority has to be considered[55] so that where a voluntary winding up by the creditors or members is not in the best interest of the majority

the petition will be refused unless the sole or minority creditors can show special and compelling reasons for the petition.[56]

As regards the contributory, Section 485 is clear, that he has to show that the interest of the contributories will be prejudiced by the voluntary winding up be it a members or creditors winding up.

In considering whether to grant a petition to convert to a compulsory winding up, the court if it thinks it otherwise may, instead order that the voluntary winding up be continued with but under the court's supervision.[57]

Where the court deems it fit and grants an order for compulsiry winding up, The earlier voluntary winding up is superceded by the compulsory winding up and it is deemed to have commenced on the date the resolution to wind up was passed under the earlier voluntary winding up and all proceedings previously taken under the voluntary winding up are deemed to be valid unless it is proved to the contrary i.e. that they were the result of a fraud or mistake etc, in which case the court shall direct otherwise as it thinks fit.[57(a)] Once the order has been given by the court to continue the winding up as a compulsory winding up, the provisions of the Act as regards

compulsory winding up shall begin to apply, until the winding up is completed.

The procedure for petitioning for a conversion to compulsory winding up is the same as when a fresh petition is brought for a compulsory winding up in the first instance. This procedure is provided for in Rules 15 - 20 of the Companies Winding Up Rules 1983[58] and has been discussed in Chapter 3 of this thesis.

4.9 WINDING UP SUBJECT TO COURT'S SUPERVISION

Where a resolution is passed pursuant to Section 457 of the Act under a Voluntary Winding up and a contributory or a creditor petitions the court that for certain cogent reasons, the Winding up be continued as a compulsory winding up,[59] the court may if it thinks otherwise order instead that the voluntary winding up continues, but subject to such supervision of the court and with such liberty for the contributories and creditors and other concerned persons to apply to the court and generally on such terms and conditions as the court thinks just.[60]
However by operation of Section 486 of the Act alone, a member or creditor or other concerned persons may petition that a voluntary winding up be proceeded with under the

supervision of the court for such reasons as the court on the application of such person may be inclined to grant by ordering that the voluntary winding up be proceeded with under the supervision of the court.[61] It suffices here to state that the petition to the court to grant a supervision order on a voluntary winding up pursuant to Section 486 is not automatic. The petitioner has to adduce compelling reasons to back his petition. The more common reason however is usually that the winding up if conducted as a voluntary one, will prejudice the interests of the petitioner or the class of persons he belongs to in relation to the Company i.e. Creditors may petition that a members voluntary winding up is being so improperly conducted as to prejudice their interests.

A petition for the continuance of a voluntary winding up subject to the courts supervision shall for the purpose of confering jurisdiction on the court over the winding up proceedings be deemed to be a winding up by the court i.e. compulsory winding up.[62] Consequently the provisions of the Act applicable to compulsory winding up will apply unless otherwise provided by the Act itself.
The few exceptional cases where the provisions applicable to compulsory winding up may not apply are as follows:

4.9.1 Appointment of Liquidator

When the court grants an order enabling it to supervise a voluntary winding up, the court may by the same or a subsequent order appoint its own liquidator in addition to the one already appointed either by the contributories or by the Creditors as the case may be.[63] This additional liquidator appointed by the court shall have equal powers, rights and obligations as the liquidator earlier appointed under the voluntary winding up.[64] The court also reserves the right to remove the liquidator it appointed or indeed any other liquidator earlier appointed under the voluntary winding up and the court may fill such vacancy as is created by the removal or any other vacancy created by the death or resignation of a liquidator.[65]

It should be noted that the powers of the court to appoint an additional liquidator is discretionary and not mandatory, since the words used by Section 489(1) of the Act says "May..... appoint".

In the same vein the courts powers to fill up a vacancy created by the removal, death or resignation of a Liquidator is equally discretionary and not mandatory.

The implication therefore in the above two situations is that the court may if it finds it unnecessary refrain from appointing an additional Liquidator and equally, the court may refrain from filling a vacancy so created as aforesaid in which case the members of the Company and the creditors in their separate meetings shall jointly agree on who should be appointed Liquidator.[66] Before however this appointment is made to fill the vacancy or if there is delay in appointing a Liquidator or for any reason a liquidator is not forthcoming, then the official receiver who is an officer of the court shall fill the vacancy and act as Liquidator until one is appointed by the court.[67]

The order of court if granted, that a voluntary winding up should convert into a winding up under court supervision the said court order shall be advertised in the Federal Government Gazette once, and at least once in two National daily newspapers in which the petition seeking the order was advertised. The order is also required to be served on all concerned persons (if any) and in such manner as the court shall direct. All these procedures must be complied with, within 28 days of the grant of the order.[68]

4.9.2 Powers and Duties of the Liquidator in Winding up under Court Supervision.

The liquidator in a winding up under court supervision, by Section 490 (1) of the Act may exercise all such powers and perform such duties as a Liquidator in a Voluntary winding up may exercise, either with leave of the court or without leave as the case may be.[69] The Liquidator may however exercise the said powers subject to such restrictions as may be imposed by the court in its supervisory role.

4.9.3 Exemption from Certain Provisions Applicable to Compulsory Winding Up

Section 490 (2) of the Act provides that even though an order to proceed with a winding up under court supervision is deemed to be an order for compulsory winding up, in which case the provisions of the Act applicable to compulsory winding up ought normally to follow, However to maintain that voluntary nature of the winding up certain provisions peculiar to compulsory winding up are excluded from applying to the winding up under court supervision, after all the underlying fact is that the winding up was not intended to be conducted as a compulsory winding up, the involvement of the court here is only supervisory. This fact come clearer to light when it is noted that even the liquidator's powers in the winding

up under court supervision are allowed to be exercised as if the winding up were still a purely voluntary winding up. Those provisions which are peculiar to compulsory Winding up but which have been specifically exempted from applying to winding up under court supervision are outlined in schedule 12 to the Act The sum total of an order to proceed with a voluntary winding up under court supervision is actually to allow the winding up to continue as a voluntary winding up, but with such restrictions or directions as the court may deem fit to make, other wise the liquidator is allowed to wind up the Company while the court supervises him to ensure that the winding up is properly and fairly conducted.

FOOT NOTES TO CHAPTER FOUR

1. Section 457, Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria 1990.
2. Section 486
3. Section 408 (2)
4. Section 48 (1) (2)
5. Section 233 (1)
6. Section 457(a)
7. Section 457 (b)
8. Section 459
9. Section 458
10. Rule 19, Companies Winding Up Rules 1983.
11. Section 460
12. Section 461
13. Section 464 (2)
14. Section 473 (2)
15. Section 512(1)
16. See the discussion on "Effects of a winding up Order" Chapter three paragraph 3.3.3
17. (1930)2 KB 1 (Court of Appeal, England)
18. Section 492
19. Section 410(1)(b) and (3)
20. Section 642 (4) and Sections 472 - 478
21. (1971) 1 All E R 681. per Magarry, J.
22. Section 466
23. Section 464 (1)
24. Section 482
25. Section 491
26. Section 467
27.

27. See paragraph 4.2.4 ante and Section 469

28. Section 468 (1)

29. Section 468 (2)

30. Section 468 (3)

31. Section 468 (4)

32. Section 468 (5)

33. See Chapter 3 paragraph 3.9. ante

34. Section 466

35. Section 473 (1)

36. Section 474 (1)

37. Section 472 (1) amd (5)

38. Section 474 (1)

39. Sections 434 (2) - (8)

40. See paragraph 4.2.4 ante.

41. See paragraph 4.2.5 ante.

42. Section 481 (1)

43. Section 425 (1)(d)

44. Section 425 (1)(e)

45. Section 425 (1)(f)

46. For a comprehensive list of these powers of the Liquidator in compulsory winding up which may be exercised by the Liquidator in voluntary winding up without sanction, See chapter 3 paragraphs 3.4.6

47. Section 481 (1)(c), (1)(d), (1)(e) and Section 481 (2).

48. See Chapter 3 paragraph 3.5 ante.

49. See Chapter 3, paragraphs 3.6 - 3.7.6, ante.

50. Rule 155 (3) Companies Winding up rules, 1983.

51. Section 514

52. Section 515 (1)(b) and (2)

53. Section 524 (1)

54. Re James Millward & Co. Ltd (1940) Ch. 333 C.A.

55. Re Home Remedies Ltd (1943) Ch. 1 & Section 410 (3)

56. Bouboulis v. Mann, Macneal & Co. Ltd (1926) SC (English) 637; Re B. Karberg Ltd (1956)1 WLR 57 (C. A.); Re J. D. Swain Ltd (1965) 1 WLR 909

57. Section 410(3) and 486

57(a) Section 415 (1)

58. See Chapter 3 paragraph 3.3.1 ante.

59. Section 485

60. Section 486

61. For a more detailed discussion on the reasons and circumstances under which the court may consider to supervise a voluntary winding up, see paragraph 4.8 ante,

62. Section 487

63. Section 489(1)

64. Section 489 (2)

65. Section 489(3)(c)

66. Section 422 (3)

67. Section 422 (1)

68. Rule 30 (2)

69. See discussion on powers of a Liquidator in Voluntary winding up in paragraph 4.4., 4.4.1 and 4.4.2 ante.

CHAPTER FIVE

PHILOSOPHICAL BASIS FOR WINDING-UP

INTRODUCTION.

In Chapter One of this work it was highlighted that one of the essential consequence of incorporation is the attendant benefit of perpetual succession that a Company enjoys as a separate legal entity. This means that the Company enjoys an infinity of life span which can be brought to an end only by way of winding up, except for defunct Companies which may be dissolved summarily without recourse to the due process of liquidation or winding up.

Liquidation no doubt is a drastic measure[1] because it brings to an end the life of a Corporate Legal entity and thereby crushes all the dreams of a huge financial empire that the organisation might have produced, without any guarantee that those who invested therein will recover their money, particularly if the Company was insolvent as at the time of the Liquidation.
However, as drastic as Liquidation has appeared to be, it has been provided for in the Act[2] as an alternative remedy[3] for creditors and contributories etc. Who for the purposes of certain fundamental interests constitute a

minority who have been pressed beyond measure by the oppressive or unfairly prejudicial conduct of the majority or the controllers of the Company or who for other legitimate reasons[4] believe and feel strongly that the company no longer serves the purposes for which it was formed and so should be wound up.

Since the Companies and Allied Matters Act, 1990 was enacted to regulate the affairs of Companies and other Allied Corporate entities in Nigeria within the context of modern business realities, it had become imperative for the Act to address the vulnerability of the interests of the minorities within the Company as well as other investors who are not members of the Company but have stakes therein, such as a debenture holder and therefore should have a say on how the Company is being run, so that on the strength of his stake, if the Company for any legitimate reason is not performing as expected, such a creditor or contributory should have a say on whether the Company should continue or not.

In modern Company law, there is a clear division of power and labour in the operation of Companies, so that the Investors ordinarily have no say on how the Company should be run.[5] This is the duty of the board of directors i.e. to run the affairs of the Company. The board of

Directors may also be too busy running after other businesses and therefore delegate their powers to a single individual called the Managing director or to a Committee of the board constituted by such numbers of members of the Board as they deem fit[6], who will proceed to manage the Company. A minority may be adversely affected or totally opposed to the way things are being done, but because they are placed in an importunate situation, they may be totally helpless to redress the situation. In such circumstances, the law does not allow such investors to be at the mercy of the controllers of the Company, they may petition for a winding up as of right.

A capitalist who risks his capital in a Company either as a shareholder or as a creditor, and who does not claim the right of say in how the Company is managed would be, or is a mere gambler, if not, he should be able to also determine whether the Company should live or die and such right should and can only be determined by the court in the face of other conflicting rights of Investors who feel to the contrary. One would there fore agree with Professor L.C.B. Gower and E. O. Akanki when they stated that[7] it is in recognition of such realities of modern commercial dealings that the common law and Company Law

statutes are providing protective devices to safeguard the interests of the weaker or minority groups.

It is submitted therefore that the above discussions forms the basic philosophy behind the provision of winding up in our statute books, i.e. as a protective devices to Investors and creditors to exercise where necessary. This remedy of winding up may be exercised by various interest groups[8], However, those that are of concern to us here are the creditors and contributories because they are the two main groups that risk their capital in the Company i.e. they are the financiers of the Company and therefore have the greater and more important say in the Company. The philosophical basis of winding up will therefore be discussed in the light of both the Investor and Creditor protection only. For the purpose of utilising this protective device of winding up, it is pertinent to identify who is a creditor and who is an Investor. The Act does not define who a Creditor is, However it is not in dispute that in general English usage, a creditor is a person to whom one owes money[9]. Schedule two, part one, Section C paragraph G of the Act settles a list of persons who could be regarded as creditors to a company, for the purpose of

the preparation of the Company's balance sheet for each financial year. This list indluces:

(1) Debenture Loan

(2) Bank Loans & Over drafts

(3) Payments received on Accounts

(4) Trade Creditors

(5) Bills of exchange payable

(6) Amounts owed to group Companies

(7) Amounts owed to related Companies

(8) Other Creditors including taxation and Social Security i.e. PAYE & National Provident Fund dues.

(9) Acruals and deffered Income.

Taking into account the baove list and considering the effects of Section 409(c) of the Act, any person to whom the Company owes money under any of the above mentioned headings, be he a contingent or prospective creditor, is eligible to exercise the right to petition for winidng up.

As regards who an investor is, the Act is also silent, however, the issue of who is an investor, is itself a very controversial one. L. B. Curzon's Dictionary of law defines "Investment" as meaning "to apply money in the purchase of some property with view to

getting interest or property and this includes Assets, rights, interests (i.e. shares, debentures, securities, long term Insurance policies etc)". From the above definition, it is shown that a debenture holder who is clearly a creditor is regarded also to be an investor, Just as a shareholder is. Professor Gower[10] in classifying Investors also groups debenture holders as investors. The question therefore is whether creditors are also investors or is there a distruction between the two? In deciding this issue, one point must be conceded. A person who Advances money to a Company with view to getting interest or returns on his money is investing, so also is a share holder who buys shares and hopes to get interest in the form of dividends. Therefore creditors are also investors, however, shareholders are not creditors, they are purely investors and do not stand in the position of Creditors to the Company, being members and owners of the Company and therefore the money they invest becomes the company's money, their only interest being the dividends they will get. For the purpose of distinquishing the owners of the Company from those who merely loan it money and are therefore entitled to their money plus the acrued

interest, only the shareholders are deemed to be Investors being the owners of the Company and Creditors are classified as outsiders and non owners and therefore they are more of Creditors than investors because they do not risk losing their capital with the investment, unlike the shareholders who lose their money if the Company fails. Conclusively therefore, creditors are persons to whom the Company owes money and investors are those who stake their money in the Company with the risk of losing or profiting therefrom should the Company fail or succeed as the case may be.

5.1 CREDITOR PROTECTION.

Sections 310 & 311 of the Act allows a Creditor to petition for the winding up of a Company where his interests have been unfairly treated or where he has been unduely oppressed. Such incidences of unfair treatment and or oppressive conduct against a creditor includes[11] such situations where, there is a Corporate Reconstruction, Merger, Takeover or any other scheme of arrangement or compromise which do not adequately provide for or which disregards the interest of the Creditors as to put their credit in jeopardy , or where a director

appointed by the creditors or a class of them who serves to protect their interest in accordance with the terms of their agreement has been or is being removed as to jeopardise the interests of the creditors, or the taking of decisions by the company which are capable of being or are a threat to the debentures or floating charges etc on the assets of the Company which serve as security for the Loan.

Where a creditor alleges and proves unfair treatment or oppressive conducts detrimental to his interest, he may petition for the company to be wound up to enable him recover his money. Although a petition brought under Sections 310 - 312 of the Act on the ground of unfair treatment or oppression would be subject to the courts' discretion to grant even if the unfair treatment or oppression has been proved. The court has discretion to instead enter an order abating the unfair treatment or oppression. It is however submitted that despite the discretionary power granted by the court under Section 312 of the Act to instead of a winding up order, make an order as it

thinks fit to give relief to the oppressed creditor, where such other relief would not be as effective in redressing the oppressive conduct as a winding up order will do, then a winding up order must be made in the circumstance even if it seems rather too harsh.

Alternatively a creditor may petition for redress under Section 408 (e) of the Act, on the ground that it is just and equitable to wind up Company.

Where a Company receives a financial aid either in cash or kind and the money becomes due but remains unpaid due to either insolvency or otherwise, so that it is apparantly impossible to recover the money with the interest, the creditor is faced with the imminent danger of losing his money if nothing is available to pay him. It spells doom for any economy where loans as a means of raising capital for investment becomes unviable because creditors stand the risk of losing their money should the debtor company fail to pay up. The fact is financiers will simply refuse to advance credit even to worthy investments for fear of losing out should the Company fail.

It is in the face of such realities that the law has provided the Creditors with this tool of Company Liquidation as a guarantee that they do not lose their

credit even if the debtor company fails. Under Section 209 (2)(b)(ii) combined with the effects of Section 408 (d) and (e) of the Act, a creditor whose credit is held up in an unviable company may insist that the company be wound up, its assets sold and his money paid up. Liquidation therefore is a very potent weapon of protection to be wielded by a creditor because, once the winding up order is granted by the court, the entire procedure is geared towards first of all satisfying the claims of the creditors in their order of priority before any other person, that is to say, the interests of the creditors becomes of paramount consideration.[12]

Liquidation as noted is a drastic measure it brings the life of a company to an abrupt end and kills the goose that lays the golden egg. It is even more painful when the goose is kill ed by an outsider like a creditor who neither knows nor feels the pain and disappointment the owners of the Company feel and who cares for nothing but his money, so that if it means to kill the company in order to get his money back, that would be okay for him. That there are other remedies may matter less to him, When this philosophy is considered, it becomes imperative to properly allocate and manage resources

within the Company so that it succeeds and have enough to meet its obligations else it is good for nothing but to be wound up so that only the healthy and viable companies that are profitable should be allowed to live.
In recent times however, the creditors have devised strategies of debt recovery by mere threat of liquidation. This has been held to be a legitimate use of the petition to winding up with the idea of inducing the company to pay up by reason of not daring to face the risk of being wound up.[13]
In this regard, a creditor files a petition for winding up on the ground of inability of the company to pay a debt that is due but remains unpaid despite Legitimate demands therefore.[14] Thereafter the Company is asked to pay up or forced to negotiate the debt unless it wants the petition to be heard. Most often than not, the company will ask for an out of court settlement with view to paying to avoid the petition. This procedure is different from the ordinary claim for debt recovery, whose aim is to recover money and not a winding up order.

Even in voluntary Liquidations adequate provisions have been made for creditors protection so that unless the company is able to pay up its debts within one year

after the commencement of a voluntary winding up, the winding up so commenced must thereafter continue as a creditors voluntary winding up under creditors control. This is to ensure that the interests of the creditors are taken care of. Where the members propose to pass a resolution for voluntary winding up but the directors do not or are unable to within 5 weeks before the date for the passing of the resolution certify that the Company is solvent, as to pay its debts, and the members refuse or neglect to allow the creditors to take over and conduct the winding up to recover their credit as provided for in chapter 3 of part XV to the Act, the Creditors may petition the court for a compulsory winding up by the court, where their interest will be of paramount importance or consideration when payments are to be made.[15]

In as much as winding up is a protective device which may be exploited by creditors to secure their money or ensure prompt payment, one aspect is left out and that is whether or not a Creditor is guaranteed that he will get anything out of the winding up process to satisfy his claims. It may well turn out that after the winding up is completed some creditors may get paid while some

may not, depending on their rank in terms of priority or it may turn out that the assets realised are barely enough to meet the costs of the winding up only and no more, in which case the creditors end up getting nothing, so that the winding up becomes a curse rather than a blessing, because once the winding up is completed, the Company is dissolved and that is the end. All unsettled liabilities that remain abate with the dissolution of the Company so that the unsettled creditors have no one to turn to. In this regard, one cannot help to agree with the Learned author, Professor L.C.B. Gower when he stated that Liquidation, though a protective device only amounts to closing the staple door after the horse has excaped[16] or what in local parlance is refered to as medicine after death.

5.2 INVESTOR PROTECTION

When people pool their resources together to float a company they are said to be investing their money in that venture, most often with the view to making profit, except if the company was floated for charitable purpose. Blacks Law Dictionary defines Investment to include "placing money or property in business ventures .... so

that it may produce Revenue or Income",[17] Investors in Company law parlance are those persons who have contributed money as part of their contribution to the Company's business without the right to expect the money contributed to come back except by way of dividends declared (if any). These investors are the share holders who in law constitute members of the Company.

As a general rule, Companies are regarded as Corporate democracies to be run along the principles of majority rule. In this regard decisions in company general meetings are taken along the lines of majority votes and the courts are not supposed to interfer into the internal affairs of the Company[18]. The implication being that the majority always get their wishes done. This therefore ordinarily places them in a vantage position to control both the board and the general meeting. The consequence of this fact to the minority in the company is that, they are stock with the wishes of the majority whether they like them or not and are therefore forced to accept the situation as a fact of business life in the company, whether this is detrimental to their minority interests or not. The sublime of the whole arguement generally is that, where the minority do not have the resources to mount a successful campaign against the majority, they stand the chance of

being perpetually oppressed or unfairly treated in the Company,[19] and this leaves the minority in a position of near helplessness with no place to ventilate their complaints.

It is with the above situation in mind that the Companies and Allied Matters Act, 1990 was enacted, with commendable statutory provisions to protect the interests of the minority in the face of majority rule. These protective provisions are found in Section 310 - 312 of the Act which makes provisions relating to providing reliefs to an oppressed or unfairly treated minority. These provisions among other things allow an oppressed minority to petition for relief by way of winding up the company on the ground of unfair treatment or oppression. The only fault with this remedy provided by Section 312 is that it does not lie at the discretion of the oppressed minority to specifically ask for winding up as a remedy and get it, rather it is for the court to decide whether winding up or any other remedy as the court deems fit is more appropriate. In the circumstances therefore, considering Liquidation as a protective device, the provisions of Sections 310 - 312 are not enough since the weapon of winding up under those

provisions is not under the control of the minority. It is understandable that, in the case of a public company which has a wide dispersal of shareholders across the globe, it may not always be proper to grant a winding up order on the mere allegation of oppression of the minority, and there by wind up a very successful and may be Large Company whereas other reliefs could have been given to redress the oppression, unless of course only a winding up order could provide an effective remedy in the face of the oppression complained of. But in the case of a private company which is founded on existing good personal relationship of the members either as friends or relations, it is only necessary and fair that it be wound up if the substratum of friendship and good relationship upon which it was founded becomes a tool of oppression or unfair treatment.

However, where the court is not disposed to granting the winding up order as a relief to the oppression complained of, a member may petition for winding up on the statutory ground that it is Just and Equitable to do so[20], so that where an oppressed member or investor is able to prove satisfactory reasons why it is Just and Equitable for the Company to be wound up, the court has

no discretion but to grant the order.

The Just and Equitable ground as a ground for winding up has its origin in the Law of partnership.[21] The partners were deemed to operate on the understanding that no member of the partnership would be entitled to exclude the other from participation in the management and profits of the firm. It was therefore considered unjust and in equitable for any one of the partners to exclude the other in disregard of the good faith which the partners owed each other.

This principle came to be applied to company law with the advent of the incorporated Company as a form of business organisation. Initially, the courts were reluctant to grant a winding up order on the ground that it was Just and Equitable to do so even where there was a manifest oppression or unfair treatment, provided it was occassioned in the course of the lawful exercise of executive powers by those in direct control of the Company.

The position however changed for the better with the celebrated decision in the case of RE WESTBOURNE GALLA-RIES LTD.[22] Wilberforce L.C. while delivering the judgement of the House of Lords held:

> "Acts which in Law are valid exercise of powers confered by the articles may never-the-less be entirely outside what can be regarded as having been in the contemplation of the parties when they became members of the Company"[23]

Therefore the exercise of powers confered by the articles, in a subtle form as to exclude a member from participation in the Management of the Company when he otherwise was entitled to, was held in this case to be enough ground to grant a winding up order on the ground that it was just and Equitable in the circumstance to do so. Lord Wilberforce went further to hold in this regard that:

> "Some underlying obligation among them as members in good faith or confidence that so long as the business (of the Company) continues, he (the plaintiff) shall be entitled to management participation, an obligation so basic that if broken, the conclusion must be drawn that the association (i.e, the Company) must be dissoved".[24] (brackets mine).

This celebrated case threw the gates wide open, so that where an oppression or unfair treatment is alleged and proved by a minority who demands winding up as a relief on the grounds that it was Just and Equitable to grant the order, the courts had no option but to grant the relief.

The Just and Equitable ground is an omnibus ground. The Act does not define what is a Just and Equitable ground for winding up. This lacuna is left for the court to fill in the exercise of its equitable jurisdiction.

In this regard the courts have the discretion to decide in each case, what constitutes the Just and Equitable ground, so that what is not Just and Equitable today may with the development of commercial activities and its attendant complexities amount to a Just and Equitable ground tomorrow. This ground for winding up gives room for other or further grounds for winding up which are not even within the contemplation of the Act, so that the courts are saddled with the responsibility of setting the precedents on what constitutes a Just and Equitable ground for granting a winding up order as relief to the petitioner. This ground for winding up is therefore not conclusive or exhaustive, however in the past, the courts have held that loss of substratum, loss of confidence in the control and management of the company, dead lock on the board so that the business of the Company is impossible to be carried on, etc have been held to be Just and Equitable grounds to wind up a Company. This list as earlier

said is neither conclusive nor exhaustive. More grounds may and are to be discovered by the courts in the course of the exercise of its Adjucative powers.

The purpose of this potent weapon of winding up in the hands of an investor is to grant him the residuary power to prevent a majority from running the affairs of the company in such a manner as to oppress or unfairly prejudice the interest of the minority. Where other remedies[25] to redress the oppression or unfair conduct, are or would be inadequate, so that winding up the company would be in the best interest of the oppressed members, then it will be granted.

Although as earlier stated, this remedy is drastic as it may amounts to killing the goose that lays the golden eggs especially where the company was a prosperous one before the winding up order is granted. If however, the relief serves no other purpose, then at least, it lies there in our statute books to give assurance to investors that they are protected even if they get trapped with a reckless or unscrupulous management in the Company where they invest.

NOTES TO CHAPTER FIVE

1. Yagba, Kanyip & Ekwo, Elements of Commercial Law 1st Ed. 1994, Tamaza Publishing Co. Ltd, Zaria Nigeria p. 292.
2. Section 209(2), 312 and 408
3. Sections 310 & 311
4. Section 408
5. Section 63 (3)(4)
6. Section 263 (5)
7. L. C. B. Gower, Principles of Modern Company Law, 5th Ed. 1992 International students Edition, Sweet & Maxwell, London p. 444 and 761; E. O. Akanki, Essays on Company Law, op. cit. p.161.
8. Section 310 & 410
9. Oxford Advanced Learners Dictionary of Current English, Oxford University Press; Blacks Law Dictionary 5th Ed. 1979. St. Paul Minnisota West Publishing Co. p. 332; L. B. Curzons Dictionary of Law, 3rd Ed. 1988 Pitman publishing, London. P. 111.
10. L.C.B. Gower op cit. p. 444.
11. M. T. Okorodudu - Tabera "Protection for Creditors" article published in E. O. Akamki's Essays on Company Law, op. cit P. 110 - 111.
12. E. N. Asamugha, "Legal framework for the Recovery of bad debts by banks" 1992 JUSTICE Journal of Contemporary Legal Problems, Vol.3, No.7 & 8, p. 88.
13. Standard Bank of Nigeria Ltd Vs Communications Joint Services Nig. Ltd (1975) A.L.R. Commercial Series 336.
14. Section 408(d) and Section 409(a) (b) & (c)

15. Section 410(3)

16. L.C.B. Gower Principles of Modern Company Law, 4th Ed. p. 737.

17. Op. cit p. 742.

18. Foss V. Harbottle (1843) 3 Have 461.

19. L. S. Sealy, Cases and Materials in Company Law 4th Ed. 1989 Butterworths, London pp. 443-444.

20. Section 408 (d)

21. Deji Sasegbon, Companies and Allied Matters Law and Practice, 1991, DSC Publications, Ikorodu, Lagos, Nigeria pp. 674 forward.

22. (1973) AC 360 at 377 - 378 also Reported as (1972)2 WLR 1289. This case is also called "Ebrahimi v. Westbourne Gallaries Ltd".

23. Ibid.

24. Ibid at (1972) 2 WLR 1289 at 1298.

25. Section 312

CHAPTER SIX

SUMMARY, CONCLUDING REMARKS AND SUGGESTIONS FOR REFORM.

6.1 SUMMARY

Part A of the Companies and Allied Matters Act, 1990 makes provision for the Corporate form of business organisation to be carried on with the attendant benefits of separate Legal entity, limited liability, perpetual succession e.t.c., which other forms of business organisations do not enjoy save, if they decide to incorporate under the Act.

The same Act also provides general and broad principles upon which the Company should be operated for the benefit of all the parties concerned.

However for the avoidance of doubt, the Act also makes provision for the winding up of a Company that inevitably cannot continue in existence due to some compelling reasons that defy all solutions. Before such a Company is wound up however, there are certain legal mechanisms that the Act provides for, in dealing with such incidences of Corporate decline or failure, (such measures include Receiverships, schemes of arrangements such as Mergers, Acquisitions and other schemes of Reconstruction) to

prevent a possible collapse and subsequent liquidation.

Where liquidation is sought for as relief by an oppressed or unfairly treated minority, the Act provides adequate alternative redress measures apart from Liquidation or winding up as provided in Sections 311 & 312 of the Act.

A more fundamental problem addressed in this research which has plagued the Corporate Business world is the phenomena of Corporate failure which is now on a high rise, more than ever before. Corporate failure or collapse is the process by which a Company gradually contracts due to several internal and external problems with which it cannot cope, which gradually force the company to fold up and be liquidated through the process of winding up proceedings as provided under Part XV of the 1990 Companies and Allied Matters Act.

The major reason for Corporate collapse is due mainly to financial stress and business failure in addition to several other factors, and these have been dealt with in Chapter two of this research work.

Liquidation, as drastic as it is, is in itself a very powerful tool for investor and creditor protection. It could be used by a creditor of Investor as a threat to

bully an oppressive regime of majority rule to abandon their oppressive or unfairly prejudicial conduct against the minority, further more, to the creditor, it is a potent tool to use against a recalcitrant management to force it to pay up a debt that is due by threatening a petition for winding up on the ground of inability to pay debt due, or where credit is trapped in an apparently failing Company, the Creditor may petition for Liquidation to recover his money by the process of winding up, in which he will be entitled to prove his claim and be paid from the assets of the Company.

6.2 CONCLUDING REMARKS

Going through part XV of the Companies and Allied Matters Act, 1990 which deals with winding up of Companies, one would find that the changes introduced by the said Act are mere improvements on similar provisions in the repealed 1968 Act, rather than radical changes. These improvements include the removal of non commencement of business after one year of incorporation or suspension of business for up to one year after incorporation as grounds for compulsory winding up. Section 408 of the Act clearly removed the above two conditions as grounds for compulsory winding up. This in my view is a welcome idea

as this will enable freshly formed Companies enough time to find their footing since it is common knowledge that under-capitalisation is a major problem in Nigeria today as this has contributed to a large extent to the collapse of many companies. The position to day is that non commencement of, or suspension of business, after one year of incorporation can only be a ground for winding up if the court finds that it is just and equitable to wind up the Company in those circumstances. Further more, even if no such petition is brought, the Corporate Affairs Commission in the discharge of its duties as the regulator of the Affairs of Companies in Nigeria, if it finds that the said Company is no longer functional, may declare the Company as defunct and consequently strike it's name off the register of existing Companies.[1]

Also, the 1990 Act has increased the minimum amount of debt for which if a Company is unable to pay, on demand when due, will amount satutorily to inability to pay debt and thereby become a ground for compulsory liquidation. Under Section 409 of the 1990 Act that minimum debt is ₦2,000, an increase from the ₦100 provided for under the 1968 Act.

This improvements also extends to the enlargement of the remedies available to a minority that has been unfairly

treated or oppressed in the management of the affairs of the Company, and in order to remove any doubts the Act specifically enlarged the definition of oppression to include isolated Acts in addition to illegal Acts and also included prejudice, discrimination and disregard for minority interests either by acts or omission of the controllers of the Company and includes them as grounds for winding up as a means of redress, among other remedies[2] The above are just a few of the said changes which are commendable improvements on the old 1968 Act.

As regards the present spate of unprecedented phenomena of corporate failure, the 1990 Act has introduced a very powerful weapon which could be used to prevent such incidences. This mechanism is embedded in part IX of the Act dealing with Directors and Secretaries which specifically makes directors and other officers personally liable for any part they play if it is shown that they contributed in making the Company bankrupt or if they should have realised that the Company was heading towards insolvent liquidation but failed to take steps to minimise or prevent the loss. For example Section 290 of the 1990 Act makes a director or officer of the Company personally liable to a creditor if such director or officer with intent to defraud, decide to misapply any funds or

property received from a creditor. In addition the creditor may still sue the company to recover any part of his credit which he is unable to recover from the fraudulent director or officer or he may sue the Company and the fraudulent director Jointly and severally. Another good example is Section 288 of the same part IX of the 1990 Act which allows for the memorandum of Association of a Company to be couched in such terms as to remove any protection the Articles or the Act statutorily confers on the directors or officers for acts done in the course or their duties by making their liability unlimited, so that they cannot draw upon any privilege attached to their offices to shield their fraudulent Acts.

The foregoing two provisions if properly enforced will reduce cases of Corporate failure arising from poor management decisions and fraud by management, Since the creditor may decide to sue a fraudulent director personally to recover his credit instead of petitioning for the winding up of the Company, And where he realises nothing, he may still sue the company to recover his money. The above provision is also additional feather in the nest of proponents of adequate protection for creditors who advance loan to a Company over which they have no control

and therefore stand the risk of losing their principal and interest in the hands of an unscrupulous or fraudulent team of management.

As regards the arguements for investor/creditor protection, it has been readily assumed that the rules relating to liquidation are focused on protecting the Investor and creditor interest since the rules are tailored in such a way as to enhance the collection of the company's assets for distribution among the Creditors and Investors only, without considering the interests of others, like the employees and the consumers of the company's products as well as the society at large which benefits from the possible philantropy of the Company and the government which uses taxes from companies for social development.

The fact remains that the company is a private enterprise except if it is a public utility corporation and the primary interests of the company is to serve its owners by the production of profits, all other persons except the creditor and investor are creatures who have no choice but to live or die with the company in terms of their interests. Since they have no hand in its management nor stake there in except for what they can get from the company.

However, in modern Company Law, the above views have become archaic. The shift is now from the former view that a Company is a purely private venture to that of a company being regarded as a Social and Economic Institution with full powers of a natural person[3] and capable by implication to make gifts for any other purpose except political. In this regard, such gifts or exercise of power to make gifts or engage in social philantrophy for public good would still be valid notwithstanding that it may not be directly in furtherance of the business of the company[4] even though this is argueable since it cannot strictly be said that making public spirited donations for charity that will enhance the goodwill of the company in its locality is not, or will not further the Company's business directly or indirectly.

On the whole, it is conceded that in granting or allowing liquidation as an investor/creditor protection, the interest of the creditor and investor are primary and should be satisfied first, however it should also be conceded that the secondary interests should also be considered i.e. the interests of the employees of the Company who work to help it produce profits, the interests of the consumers whose needs are satisfied by the products of the Company and the community which

benefits from the philantrophy of the Company. The argue-ment therefore is that both the primary and secondary interests should be put together in considering whether or not Liquidation should be employed in dealing with a failing Company, taking into view the resultant effect of the liquidation on the secondary interests and the effects the winding up might have on them, the resultant social problems it may cause and the interests of the government which derives taxes from the Company for social development purposes.

If these interests are jointly considered, may be the view of the legislature on the issue of company liquidation will not be limited to investor/creditor interests alone but also that of the larger society as enumerated above. The end result may be a legal regime that discourages Liquidation except where absolutely necessary and this is to say, winding up should not be allowed until all other avenues have been employed but to no avail before Liquidation could be granted but only as a final and inevitable option, taking all the interests together.

Even for the purposes of investor/creditor protection, the Act is still not adequate in safeguarding the interests of the Creditor or Investor in event of winding up.

The Act is quick to grant winding up as a protection to the share holders (members) and the Creditors, but it does not guarantee them that they will recover anything in the end. for example where the Assets realised during a winding up proceedings are enough to settle the cost of the liquidation as well as the preferential debts only, the Creditors and Investors are left with nothing and no where to turn to, in which case it would have been even benefitial to them rather to have the Company nursed back to life. To the Investor it would in addition to loss of capital, also amount to a loss of expected or future income and to the Creditor it means a loss of principal and possible interest.

And if the liquidation was carried out to end an oppression or unfairly prejudicial conduct, the oppression or unfair conduct would have been stopped but 'the petitioner never lives to enjoy the benefits of the relief', in which case it would have been better to eat his humble pie and petition for other remedies i.e. to remove only the unfair conduct or oppression and let the Company continue, this is akin to treating an aching tooth to health in order to enjoy its services than extracting it to relieve the pain but never again to enjoy use of the tooth.

Laying issues on this point to rest, it is submitted that where there are cases where winding up is just about the only remedy available as in cases where a company simply cannot be made to continue and rather than yield profit it becomes a credit and capital gormandizer, it should quite easily be liquidated and further capital be invested in more fruitful ventures but where a company is doing very well and due merely to a deadlock or lack of confidence in the management or oppressive conduct etc, liquidation is sought, it should not be granted, the agrieved person's interest should be weighed against that of the wider social responsibility of such a prospering and promising company and the wider conglomerate of diverse social and economic interests of the community where the Company is Localised.

Another important Lacunae is in the area of Corporate failure. The 1990 Act advances Liquidation as an escape route for a trapped creditor or investor who is caught up in a set of circumstances in a company of which he cannot withstand, however the Act does not care to address the issues of the causes of corporate failure so as to at least prevent the phenomena. Where these issues are addressed, it would then be articulate and proper to advance the legal regimes for dealing with it. The 1990

Act came at a time when the Structural Adjustment Programme of 1986 and beyond sparked off this phenomena of Companies contracting and failing.

It would have been expected of the Committee on the reform of Nigerian Company Law who worked to produce the Companies and Allied Matters Act, 1990 as the current legislation on the subject in Nigeria to looked into this issue.

As long as this lacunae has not been filled, it remains for the architects of each individual Companies to research on, and take steps to avoid those pitfalls that leads to company collapse or where they cannot be avoided as for example due to prevailing harsh Economic Policies or a depressing Economy, then ways of coping should be researched into. Some of these causes have been dealt with in Chapter 2 of this Research.

It is my humble view however, that since the 1990 Act purports to be only a Companies (and Allied Matters) Act The above mentioned lacunae could be excused, after all, of all the Company legislations within the Commonwealth of British Colonies, non has delved into this sensitive area of Corporate collapse as to address the issues of causes of Corporate failure[5]. May be because the issue of Corporate failure is a complex one which vary from

individual company to company and bothers on subjects like Financial Accounting and Management, Business Administration or Management, Economics and Law etc. And since the business world is dynamic and the management of a Company is the internal business of its operators, the Law allows them a free hand and it only comes in when they get into trouble and there is the need to sort out issues, in which case the Law steps in, to deal with the situation and where need be, grant a winding up and settle all the parties concerned.

6.3 SUGGESTIONS FOR REFORM.

In order to finally bring this research to a close, it would be proper to first of all commend with due respect the 1988 Company Law Reform Commission for the High degree of intellectual work that they did by the production of the 1990 Companies and Allied Matters Act for Nigeria. No one as yet has arisen in History who is mortal that has a monopoly of perfection in anything, inclusive of the intellectual. No single piece of Legislation can provide solutions to cover all societal needs actual or prospective. We all, together contribute towards providing a better society for us all.

In this regard, having studied the provisions of the 1990 Act as regards it's provisions on and relating to Corporate collapse and winding up and having regard to some inadequacies which are noticeable, I hereby put forward some suggestions for reforms, hoping that someday when the present Companies Act is to be amended or reformed, these suggestions may be useful in updating such prospective Companies Act.

(1) Since the underlying philosophy behind the embodiment of the provisions on winding up in the 1990 Companies Act is to provide adequate protection for investors and creditors so that their monies are not tied down in a Company where they no longer feel obligated to, the law should have also taken note of the fact that despite the fact that the Creditor or Investor may quite easily get a winding up order, he is not assured whether he will in the end get back all or part or any part of his monies at all because if in the end no funds are realised to meet the Creditors obligation, they have to go empty handed with no one to turn to.[6]
The law should therefore be reformed to discourage petitions for winding up by making such remedy a matter of last resort so that if the complain for example is that of oppression or discrimination or disregard for

minority interest, the relief should be an order removing such malady and winding up should only be granted if it becomes inevitable i.e. where the oppression cannot be stopped unless the Company is wound up. Alternatively, such tendencies towards oppression or prejudice should be made a punitive offence, so that a first time conviction should carry with it a parole with undertaking to refrain from such acts, and where they are repeated the punitive sanction should be applied and where the court is of the view that only a winding up order would end the oppression or etc, the perpetrators of the oppression should still be visited with the punitive sanctions in addition to being liable for the unpaid liabilities of the Company, if any after the winding up. In this case nobody gets a winding up order unless all the other remedies have been explored but to no avail before liquidation will be granted and as a last resort. On the other hand those responsible for the acts which gave rise to the grant of the petition to wind up should stand the risk of being responsible for the unpaid liabilities of the Company if any as aforesaid. By this, Liquidation will be an undesirable remedy to the creditors and investors but where they are forced to get it, they still will not lose even if the Company's assets are not enough to meet their liabilities. Those who

caused the winding up will be responsible for the balance. This reform will be in line with the provisions of Section 289 and 290 of the 1990 Act, if the two sections and other similar ones are modified to read that where a director or manager or those in management or control of the Company are found to be responsible for the Acts that forced the Company into liquidation, their liabilities shall by operation of Law be unlimited. Unsatisfied claimants may sue them personally to recover any unsettled dividend or other claims after the companys assets have been collected and applied.

(2) Where winding up orders are sought by creditors for inability of the Company to pay debt, it is illogical to expect such a Company to be able to settle such debts when it is 'killed', In this regards, liquidation orders should not be given unless the option of Receiverships (with or without powers of official management of the business of the Company) with view to recovering the debts have been explored, unless it is proved that the option to liquidate the Company would be more favourable and less expensive than a receivership.

(3) It should be made mandatory for the management of a failing compaby to make arrangements or work out schemes

of arrangements with her creditors or seek for mergers or open up for acquisition, instead of opening up to an order for winding up or voluntary Liquidation, consequently they should be held:

> '... personally liable (under the provisions in part IX of the 1990 Act) if it is shown that they should have realised the Company was heading towards insolvent liquidation (but) they failed to take every step to minimise loss to the Creditors'[7] (or to avoid it). (brackets mine)

It is my humble submission that incidences of winding up will reduce where management stands the risk of personal liability in the event or being convicted for negligence leading to the winding up of a Company they were responsible to manage due to their inability to take steps to avoid the Liquidation. This liability should only be waived where it is shown that Management had taken all steps reasonably possible to avoid the winding up by arranging for schemes of arrengement with creditors, Exploring avenues for mergers or acquisitions or possible reconstructions but to no avail such that prima facie or otherwise, the winding up was inevitable.

(4) Where liquidation becomes inevitable and it is granted, there are obvious possibilities that the ordinary or unsecured creditor may not get anything if there are not enough Assets to settle all the Creditors.

The fully secured Creditors may rely on their security to recover their money. They need not prove their credit to the company as debt before they are paid, in which case only the unsecured creditors are left alone and if there is nothing left to pay them, their claims abate jointly[8], this means unless there are surplus assets to settle all Creditors, the unsecured creditors are not protected at all, should the company be liquidated for insolvency.
The Law in Section 494 of the 1990 Act should be reformed to at least allow the unsecured creditors some measure of protection, so that at least 10% - 20% of the total or net realisations from the Assets of a Company that has been wound up should be reserved for settlement of unsecured creditors in proportion to their claims respectively. This should be done where it is realised that the available assets cannot surfice to meet all of the company's obligations. This provision should be made mandatory for the liquidator to comply with and failure to comply should render the liquidator personally liable to the creditors concerned.

(5) When a Company is under a winding up a liquidator is appointed to take over the affairs of the company and conduct it to conclusion, in which case the functions of the Board of Directors abate and the liquidator takes over.

This position of the liquidator is very sensitive such that it requires a skilful person to professionally discharge the functions. However the Act has failed to provide for the quatification and status of the person who could be appointed a liquidator. The Act only states the categories of persons who cannot be appointed liquidators in Section 509, which means any person not disqualified therein is qualified for appointment. This, it is submitted is creating too wide a door or too much amplification of the categories of persons who could be appointed for the job. At least a yardstick ought to be stipulated as in the appointment of directors, after all where the liquidator is appointed, he takes over and discharges the functions of the board of directors.

In England, liquidators usually appointed are either licenced insolvency practitioners or Chartered Accountants of up to 5 years standing in practice although this is more of a matter of practice than the Law,[9] but it ought to be copied and may be codified that only certain professionals who are highly skilled as to be personally liable for professional negligence should be appointed liquidators.

(6) During the process of wimding up, the liquidator is required to give notices to these concerned about the

conduct of the whole winding up proceedings, this is calculated to protect the interests of all those who are entitled to be informed. In this regards notices are required to be published in the Gazette and in the Newspapers. In some cases the Act is emphatic that the notices should be published in a "National Newspaper" meaning one that has a National Circulation. In some other cases, the publication is required to be in a Local newspaper "circulating in the district where the registered office or principal place of business of the company is situate"[10].

This inconsistency should be removed, it better serves the interests of all concerned persons, shareholders and creditors alike that no notice intended for publication should be given in a Newspaper or media that has a restricted circulation, but one that has a circulation covering the whole country. This is necessary in view of the fact that today the modern company has become an important social and Economic institution which in the case of a large quoted company, it's shareholders (and creditors) are "numerous and dispersed" and therefore if notices are to be given they must be given the widest publicity possible without creating room for any restrictiveness that could be manipulated.

(7.) Section 493 of the 1990 Act tacitly relates the winding up of an insolvent company to Bankruptcy and by

extension makes the Bankruptcy Act applicable to Companies Liquidated due to Insolvency. This position is commendable, but it does not prevent the application of the provisions on Winding up proceedings, should the concerned persons choose to invoke them. We don't hang individuals who have gone bankrupt, if their only offence was their inability to pay their debts, then, since a company is likened to a Natural person with full capacity of action[12], Death sentence by a 'Liquidation squad' is also too extreme a penalty for an insolvent company.

There is need therefore to modify the 1990 Act to include a system of "Official Management" aimed at reviving an ailing Company as is obtained in other jurisdictions such as the South African 'Judicial Management', the Australian Official Management or the American Chapter 11 procedure.

These measures are aimed at Nursing an ailing Company back to life which was formerly bankrupt and heading towards possible liquidation. Nigeria has no such legal mechanisms even England has joined the Company of nations within the Commonwealth with such legislations.[13]

For example, the English type administration order works as follows: If a court is satisfied that a company is Bankrupt or likely to bankrupt, it shall upon a petition

brought before it, if it thinks that an administration order would likely help the ailing Company to survive in business in whole or in part either through reaching an internal Voluntary arrangement with it's creditors or members or a scheme of arrangement i.e. merger or acquisition or reconstruction or that the administration order would help in making a more advantageous realisation of the Company's assets than it would be possible under a winding up, the court shall proceed to give an administration order appointing an administrator over the company who shall be an officer of the court.

The administrator takes over the Company retaining only such or all of its Directors as he deems fit and manages its business, property and Affairs generally with view to bringing it to life or effecting a scheme of voluntary arrangement internally or externally i.e. by merger or acquisition or other benefitial reconstruction.

Although it may be argued that the Administration procedures mentioned above relate more to insolvency or Bankruptcy law than Company law, they are nevertheless of interest to Company Law especially if their operation succeeds in reviving ailing Companies. This is also an

area of primary concern to Company Law.

Further more, since the Nigerian Bankruptcy Law does not as yet contain provisions relating to administration orders by the Court, the Area is therefore novel.

Nothing stops a reform of the present company Law by way of a subsidiary Legislation to incorporate Administration Orders, so that, it becomes one of the options open to a Creditor or a contributory (member) to explore as a precondition before considering the option of Liquidation which should be made a matter of last resort or as an ultimate remedy where all other remedies fail.

NOTES TO CHAPTER SIX

1. See Section 525 (1) - (3) Companies and Allied Matters Act, 1990.

2. See Section 310 - 312 .

3. Section 38 .

4. Section 39

5. See Ghana's Companies Code, Act 79 of 1963, New Zealand Companies Act, 1955 as amended by Companies Amendment Act, Section 11 of 1980, Canadian Business Corporations Act, 1975 and Australian Companies Code amended, 1981

6. Section 494 (1) - (5) .

7. Deji Sasegbon "Legal Schemes of Collapsing finance Houses (2)" Op. cit.

8. Section 494 read with Section 448 and 493 also See Black & Co's case (1872) 8 Chan. App. 254.

9. R. R. Pennington's Company Law 4th Ed. Op. cit p. 705; Gower, op. cit, 5th Ed. p. 752.

10. Section 472 (2) of the 1990 Act . .

11. Dr. K. Midgley, 'Companies and their Share holders - The uneasy Relationship, quoted in Dr. D. J. Bakibinga Article. The reality of Corporate Power A.B.U. Law Journal 1986 - 90. Vol.4 - 8 pp. 23 - 24.

12. See Section 38 & 39 .

13. With the enactment of the English insolvency Act 1986 which provides for the appointment of an administrator to nurse an insolvent Company back to life instead of liquidating it.

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