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1. Formation of companies
2. Certificate of incorporation
3. Pre-incorporation contract
4. Promoters liability (promoters generally)
5. Regulation of company matters, CAC, Securities and Exchange Act

CLASSIFICATON OF COMPANIES

1. Public
2. Private

According to **Sec 22(1) CAMA 2020,** a private company is a company that has it stated in its memorandum of association to be a private company with features as contained in **S. 22 CAMA**.

On the other hand, according to **Sec 24(1) CAMA 2020,** any company other than a private company shall be a public company and its memorandum of association shall state that it is a public company.

DISTINCTION BETWEEN PRIVATE AND PUBLIC COMPANIES (This is a likely exam or quiz question)

S/N	PUBLIC	PRIVATE
1	The name ends with 'Plc' (29(2)) and 29(5)	The name ends with 'ltd' (29(1)) and 29(5)
2	It is stated in the M of A to be public (24(1))	It is stated in the M of A to be private (22 (1))
3	The articles of a public company do not restrict the transfer of its shares	The articles of a private company usually restrict the transfer of its shares. **S. 22(2)**
4	There is no maximum number of shareholders for a public company.	The maximum number of shareholders or members of a private company shall not exceed 50. **S.(22(3))**
5	The minimum number of shareholders for a public company is 2	There is no minimum number of shareholders for a private company. Hence, a single person can incorporate a private company.

6	For a public company, each director must be elected separately unless a resolution is adopted that two or more directors be appointed by a single vote by all the members in the general meeting.	For a private company, two or more directors may be appointed by a simple resolution
7	A public company can offer its shares to the public	A private company cannot offer its shares to the public.
8	The minimum issued share capital is two million (27(2))	The minimum issued share capital of a private company is 100, 000 (27(2))
9	A public company must have a company secretary (330(2))	For a private company, it is optional to have a company secretary.
10	Every public company must have at least three independent directors. S. 275(1)	It is not under the obligation to have independent directors.

11	According to s. 278(2), if a person is to be appointed a director in a public company and such person holds another position as a director in another company, he must disclose same.	The requirement in S. 278 does not apply to private companies.
12	According to S. 307(2) director in a public company cannot be a director of more than 5 public companies	The restriction in S. 307(2) does not apply to private companies
13	For a person who is 70 years or above to be appointed a director of a public company, such a person's age must be disclosed to members in a general meeting. S. 278(1)	A person of 70 years and above may be appointed as a director of a private company without the requirement of disclosure.
14	According to the Investment and Securities Act, 2007, no securities of a public company can be issued, sold or transferred without prior approval of the commission with respect to price, the timing and then the avenue for the sale.	For a private company, no such approval is required.

15	S. 235(1) mandates every public company to hold a statutory meeting and to consider the statutory report within six months of incorporation and this statutory report must be submitted to the Corporate Affairs Commission.	This requirement does not apply to private companies.
16	According to S. 332, the secretary of a public company must be a member of the Institute of Chartered Secretaries and Administrators, a legal practitioner, a member of any professional body of accountants, or any person who has held the office of the secretary of a public company for at least three years of the five years immediately preceding his appointment in a public company.	For a private company, no such requirement is expected and it is sufficient if the secretary is shown to be a person who appears to have the requisite knowledge and experience to discharge the functions of a secretary of a company.

CLASSIFICATION OF COMPANIES BY TYPES – S. 21

1. Companies limited by shares S. 21(1a)
2. Companies limited by guarantee S. 21(1b)
3. Unlimited companies S. 21(1c)

According to **section 21(1a) of the CAMA**, a company limited by shares is a company in which the liability of its members is limited by the memorandum of association to the amount, if any, unpaid on the shares respectively held by them.

While according to **section 21(1b) of the CAMA,** a company limited by guarantee is a company in which the liability of its members is limited by the memorandum of association to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up.

On the other hand, according to **section 21(1c) of CAMA,** an unlimited company is a company not having any limit on the liability of its members. Hence, if the company acquires any debt, it shall be paid by all its members without any limitation.

FEATURES OF A COMPANY LIMITED BY GUARANTEE – S. 26

1. It is formed for the promotion of commerce, art, science, religion, sports, culture, education, research, charity and similar objects.
2. No property or income of a company limited by guarantee shall be applied towards any other purpose except for the promotion of its objects – S. 26(1)
3. It must not be formed for the purpose of making profit for distribution to its members – S. 26(3)

4. The consent of that AG Federation is needed to register the memorandum of a company limited by guarantee. The said consent should be given within 30 days – 26(4) and 26(5).
5. The total liability of a member of a company limited by guarantee to contribute to the assets of the company in the event of its being wound up shall not, at any time, be less than 100,000.

SIMILARITIES AND DIFFERENCES BETWEEN AN INCORPORATED TRUSTEE AND A COMPANY LIMITED BY GUARANTEE

SIMILARITIES

1. Both are established for the purpose of promoting a charitable objective.
2. Both are non-profit entities
3. Both have members who agree to contribute a specified amount towards any undischarged liabilities.
4. Both enjoy the benefits of incorporation.

DIFFERENCES

INCORPORATED TRUSTEE	COMPANY LIMITED BY GUARANTEE
Has a board of trustees	Has a board of directors
Cannot venture into profit making business	Allowed to venture into profit making agenda but cannot share profit among

	members.
Does not need the consent of the AG for registration	Needs the consent of the AG for registration
Memorandum and articles of association are not required.	Memorandum and articles of association are required.
Registration requires newspaper publication before incorporation	Registration does not require newspaper publication before incorporation.

CONCEPT OF CORPORATE PERSONALITY

The direct consequence of incorporation is that it confers the privilege of corporate personality on the company. This was held in **Salomon v Salomon** and **Marina Nominees v Federal Board of Inland Revenue.**

ADVANTAGES OF INCORPORATION

1. The company becomes a different person from its members by virtue of incorporation – **S. 42 CAMA**.
2. Limitation of liability – **UBA Plc v Orharhuge**.
3. Right to own properties – **Macaura v Northern Assurance Co Ltd**.
4. Perpetual succession – **Macaura v Northen Assurance Co Ltd**.
5. Legal actions – **Salam v Bank of the North**

6. Separate legal personality – **Salomon v Salomon**
7. Borrowing Capacity.

DISADVANTAGES OF INCORPORATION

1. The company, now being a separate legal entity, the trader who sells his business to the company will have no insurable interest over the property.
2. The ultra vires doctrine limits the company's capacity to the business specified in the business clause.
3. The sole owner who incorporates his business can now steal from his company.

RIGHT OR CAPACITY TO FORM A COMPANY

According to **section 18(1) of the CAMA**, any two or more persons may form and incorporate a company by complying with the provisions of the Act in respect of registration of companies. Also **section 18(2) of the CAMA** states that notwithstanding subsection 1, one person may form and incorporate a private company by complying with the provisions of the act in respect of registration of private companies.

However, according to **section 18(3) of the CAMA,** the right and capacity to form a company does not extend to the incorporation of a company for an unlawful purpose.

Furthermore, an incorporated company may also join in forming another company and subscribing to its memo and article. However, where the incorporated company is in liquidation, it shall not so join in forming another company as was held in **Section 106(3)**.

When a company has been incorporated and its subscribers are persons of full capacity, that requisite capacity must remain throughout the life of that company.

RESTRICTIONS ON THE CAPACITY TO FORM A COMPANY

According to **section 20(1) of the CAMA**, an individual shall not join in the formation of a company if he is under the age of 18, is of unsound mind, is an undischarged bankrupt or disqualified under **section 281 & 283 of the CAMA** from being a director of a company.

However, by **section 20(2) of the CAMA**, a person shall not be disqualified on grounds that he is under the age of 18 where two others not disqualified under that subsection have signed the memorandum.

RESTRICTION ON ASSOCIATIONS OR PARTNERSHIPS EXCEEDING 20 PERSONS

According to **section 19(1) of the CAMA,** no association or partnership exceeding 20 persons shall be formed for the purpose of carrying on any business for profit or gain, except unless it is registered as a company

under this Act or is formed in pursuance of other enactments in force in Nigeria. But by **section 19(2) of the CAMA,** the effect of subsection 1 shall not apply to cooperative societies, legal practitioners and accountants.

ON THE RIGHT AND CAPACITY OF FOREIGNERS TO FORM A COMPANY IN NIGERIA

According to **section 78(1) of the CAMA**, subject to the power of exemption provided under **section 80 of the CAMA,** every foreign company who before or after commencement of the act was incorporated outside and in Nigeria and having the intention of carrying on business in Nigeria, must take all necessary steps to be incorporated as a separate entity in Nigeria, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act.

The effect of **section 78 of the CAMA** is to bring the local subsidiaries of foreign companies within the regulatory ambit of the commission. According to the court in **Watamal Singapore ltd v Olofin & co ltd,** the section does not deal with the question of the legal personality of the company, thus a foreign company may still sue and be sued in Nigeria.

FORMATION OF A COMPANY

The following step by step procedure is fundamental for the formation of a company;

1. Taking instruction.
2. Create account in the CAC company registration portal
3. Check for availability of proposed name of company.
4. Reservation of name
5. Complete the pre-registration form by filing all the required fields online using the Company Registration Portal (CRP)
6. Upload all required documents i.e. signatures, means of identification of directors and shareholders online using the Company Registration Portal.
7. Pay the filing fees with credit or debit card online on the Company Registration Portal.
8. Pay the stamp duty fees online on the Company Registration Portal.
9. Download and print electronic certificate and certified extract of registration information already generated to your dashboard after approval.

1) Accreditation With The Corporate Affairs Commission;

Any person desirous of registering a company must first be accredited in the corporate affairs commission's website. Only lawyers could before do so, but the window is open to all persons now.

2) Availability Check And Reservation Of Name;

Secondly he must check for what name to use, this is filed in **CAC FORM 1,** it is important so as to avoid instances of using a name already in existence and registered as another's company name, or using a name which is similar with another one in existence which is likely to deceive or cause confusion, or using a name which is prohibited or a name which is restricted without proper consent, the consequence thereof will be the rejection of such name.

3) Reservation Of Name;

A person must then ensure the reservation of the name intended to be used, after 60 days the reservation will usually elapse, but where it is utilized within the time frame, the name may be approved.

4) Complete The Pre-registration Form;

A person should then complete the pre-registration form by filling all the required fields online using the company registration portal. This includes;

i) Providing two copies of the memorandum of association and articles of association. By **section 36(1)&(2) of the CAMA,** they must be submitted alongside the application for registration and the application must state;

(a) the company's proposed name ;

(b) the registered office address and head office address if different from the registered office address ;

(c) whether the liability of the members of the company is to be limited and, if so, whether it is to be limited by shares or by guarantee ; and

(d) whether the company is to be a private or a public company.

ii) notice of the registered office of the company and the head office if different, to be filed in **CAC FORM 3**

iii) list and particulars of persons who have consented to be the first directors of the company, together with their consent, to be filed in **CAC FORM 7**

iv) two copies of statement of the authorized share capital signed by at least one director, to be filed in **CAC FORM 2**

5) Any other document required by the commission to satisfy the requirements of any law that may make prescription relating to matters that may be associated with the formation of a company. E.g. certificate of proficiency.

6) A statutory declaration in the prescribed form by a legal practitioner that the requirement of the act in relation to the registration of a company have been complied with, to be filed in **CAC FORM 4**

7) Pay the filing fees with a credit or debit card on the company registration portal

8) Pay the stamp duty fees online in the company registration portal

9) Download and print electronic Certificate and certified extract of registration information already generated to your dashboard after approval.

INCORPORATED COMPANIES

An incorporated company is a company which has been formed and registered under the laws that regulate the registration of companies in a given country. In Nigeria, an incorporated company is one that has been registered under CAMA. When a company is registered as mentioned above, it is said to be incorporated.

This act of incorporation automatically converts the company into a juristic person recognised by law as having all the powers and functions of an incorporated company. These include the powers to acquire and own property, to sue and be sued eo nomine (in its name), to have a common seal and perpetual succession etc. in short, the company becomes a legal abstraction invested with rights, duties and functions and is separate and distinct from shareholders as was held in **NNPC v Lutin Investment Ltd** and **Akinkugbe v EHN Ltd.**

CONSEQUENCES OF INCORPORATION

1. The company becomes a body corporate by the name contained in its memo with effect from the date of registration.

2. The company assumes a separate identity from the members who comprise it as was held in **Salomon v Salomon** and **Lee v Lee's Air Farming.**
3. The company is entitled to exercise all the powers and function of an incorporated company.
4. The liability of the members to contribute to the assets of the company in the event of it being wound up becomes limited only to the amount unpaid by them at the time of winding up as was held in **STB PLC v Olusola** and **Akinkugbe v EHN Ltd.**

THE CERTIFICATE OF INCORPORATION

When a company is registered, a certificate bearing the name of the company and the date of registration is issued by the commission. It serves as a prima facie evidence that all the requirements of the CAMA have been complied with.

Section 41(5) of the CAMA provides for the issuing of the certificate of incorporation by the corporate affairs commission. It states that upon registration of the memorandum and articles of association, the commission shall certify in its seal that;

(a) that the company is incorporated ;

(b) in the case of a limited company, that the liability of the members is limited by shares or by guarantee, or an unlimited company, that the liability of the members is unlimited, and

(c) that the company is a private or public company, as the case may be.

And according to **Section 41(6) of the CAMA**, the certificate of incorporation shall be prima facie evidence that all the requirements of this Act in respect of registration and matters precedent and incidental to it have been complied with and that the association is a company authorized to be registered and duly registered under the Act.

Hence, as was stated by the court in the case of **Wilts & Bush ltd v Goodwill & Trust investment ltd,** once a Certificate of incorporation is issued to a company it becomes a body Corporate with perpetual succession. The court in **STB plc v Olusola**, also noted that a company upon incorporation becomes a legal person distinct from the members who formed it and is capable of acquiring, holding and alienating property.

CLAUSES IN THE MEMORANDUM OF ASSOCIATION – **S. 27**

According to **Section 27 CAMA,**

(1) The memorandum of association of every company shall state—

(a) the name of the company ;

(b) that the registered office of the company shall be situated inNigeria ;

(c) the nature of the business or businesses which the company isauthorised to carry on, or, if the company is not formed for the purpose of carrying on business, the nature of the object or objects for which it is established ;

(d) the restriction, if any, on the powers of the company ;

(e) that the company is a private or public company, as the case maybe ; and

(*f*) that the liability of its members is limited by shares, by guarantee or unlimited, as the case may be.

(2) If the company has a share capital—

(a) the memorandum of association shall also state the amount of the minimum issued share capital which shall not be less than N100,000.00 in the case of a private company and N2,000,000.00, in the case of a public company, with which the company proposes to be registered, and the division thereof into shares of a fixed amount ; and

(b) each subscriber shall write opposite his name the number of shareshe takes.

Hence, the clauses in order are:

1. Name clause (27(1)(a))
2. Registered office clause (27(1)(b))
3. Object clause (27(1)(c))
4. Restriction clause (27(1)(d))
5. Type or status clause (27(1)(e))
6. Liability clause (27(1)(f))

7. Minimum issued share capital clause (27(2a))

NAME CLAUSE:

According to **section 27(1)(a) of the CAMA,** the memorandum of association of a company shall state the name of the company. A company being an artificial person must be identified by its own name, as it aids in distinguishing the company from others.

REGULATION OF CHOICE OF NAMES

Not all names are permitted under the Act, the use of names by companies and other business organizations is regulated under the companies and allied matters Act. A person desirous of forming a company must make sure the name of his company does not fall within the prohibited or restricted names under the Act.

PROHIBITED NAMES

According to **section 852(1) of the CAMA**, no company, limited liability partnership, limited partnership, business name or incorporated trustee shall be registered under this Act by a name or trademark which—

(a) is identical with that by which a company or limited liability partnership in existence is already registered, or so nearly resembles

that name as to be calculated to deceive, except where the company or limited liability partnership in existence is in the course of being dissolved and signifies its consent in such manner as the Commission requires ;

(b) contains the words “Chamber of Commerce” unless it is a company limited by guarantee

(c) in the opinion of the Commission, is capable of misleading as to the nature or extent of its activities or is undesirable, offensive or otherwise contrary to public policy ;

(d) in the opinion of the Commission, would violate or conflict with any existing trademark or business name registered in Nigeria or body corporate formed under this Act unless the consent of the owner of the trade mark, business name or trustees of the body corporate has been obtained ;

(e) contains any word which, in the opinion of the Commission, is likely to mislead the public as to the nationality, race or religion of the persons by whom the business is wholly or mainly owned or controlled ;

(f) is, in the opinion of the Commission, deceptive or objectionable in that it contains a reference or suggests association with any practice,institution, personage, foreign state or government, international organization or international brand or is otherwise unsuitable ; or

(g) is capable of undermining public peace and national security.

In **Mustapha v Corporate Affairs Commission**, the court upheld the refusal of the commission to register the name Aguda investment Ng ltd,

since it was likely to conflict with the already registered name Aguda ventures Ng ltd.

In **Corporate Affairs Commission v Ayedun,** the court upheld the Commission's refusal to register the name Credit registry ltd since it tended to mislead the public into believing the company was a public institution.

Also In **Ewing v Buttercup margarine co,** the plaintiff obtained an injunction restraining the defendant from carrying on with the name buttercup margarine co, since it tended to conflict with that of his company buttercup dairy co.

However, according to the court in **DW. Boulay v DW. Boulay**, the mere similarity of a name will not in itself be a sufficient ground for an injunction, in the case of a company, registration will be refused only where there is likelihood of deception or confusion.

RESTRICTED NAMES

According to **section 852(2) of the CAMA**, except with the consent of the Corporate Affairs Commission, no company, limited liability partnership, limited partnership, business name or incorporated trustees shall be registered by a name which—

(a) includes the word “Federal”, “National”, “Regional”, “State” ;

(b) “Government”, or any other word which, in the opinion of the Commission suggests or is calculated to suggest that it enjoys the

patronage of the Government of the Federation, the Government of a State in Nigeria, any Ministry or Department of Government, or contains the word “Municipal” or “Chartered” or in the opinion of the Commission, suggests or is calculated to suggest, connection with any municipality or other local authority ;

(c) contains the word “Cooperative” or its equivalent in any other language or any abbreviation; or of the words “Building Society” ; or

(d) contains the word “Group” or “Holding”.

In **Amasike v Registrar general C.A.C**, the upheld the Commission's refusal to register a company with the name institute/bureau of Corporate governance, as the name tended to suggest some sort of government patronage.

AVAILABILITY AND RESERVATION OF NAME

This is usually necessary where the company is in the stage of its formation, the commission may reserve a name for sixty days. According to **section 31 of the CAMA,** the commission after receiving an application delivered to it in hardcopy or through electronic means, and on payment of prescribed fee, shall reserve a name pending registration of a company or change a name by a company upon confirmation of the availability of such name. And the reservation is usually valid for a period not exceeding sixty days as the commission deems fit, and during such period of reservation, no other

company can be registered under the reserved name or under any which in the opinion of the commission resembles the reserved name.

But the commission has power at any time before a certificate of incorporation is issued to withdraw or cancel a reserved name if it discovers that such name is identical with that by which a company in existence is already registered, or so nearly resembles it as to be likely to deceive. The commission may also withdraw or cancel approval for reservation of name where it is discovered that the approval was fraudulently, unlawfully or improperly procured.

REGISTERED OFFICE CLAUSE- Every company incorporated in Nigeria must have a physical office.

Section 27(1)(b) of the CAMA provides that the memorandum must state that the registered office of the company shall be situated in Nigeria. Furthermore, according to **Section 36(2)(b) of the CAMA,** every company must have a registered office, notice of which must have been delivered to the commission prior to the incorporation of the company.

The registered office is the company's official address. It provides a place where legal documents, notices and other written communications can be served. The effect of the registered office clause is to have a place for service of processes. Hence, **Section 728(1)** states that the address of the registered or head office of a company given to the CAC or any change in

the address shall be the office to which all communications and notices to the company may be addressed.

The effect of serving the company in any place that is not the registered office is that it would amount to improper service. And it should be noted that any breach of service or improper service means there was no service at all, and where there was no service at all, then the court cannot assume Jurisdiction over such a matter against the company.

Where a company desires to change its address, according to **section 728(2) of the CAMA,** notice of any change in the address of the registered or head office of the company must be given within 14 days of the change to the commission, but postal box address or a private mailbag address shall not be accepted by the commission as the registered or head office.

DOCUMENTS KEPT AT A REGISTERED OFFICE

Under the law, there are statutory documents required to be kept at the registered office which are:

1. Register of members
2. Register of secretaries and directors
3. Register of directors shareholding
4. Index of members
5. Minute books
6. Register of charges
7. Instruments creating a charge

8. Accounting records
9. Register of debenture holders
10. Register of substantial interest in shares

In **OV Insurance ltd v. Marine and General Assurance Company**, the court held that you can serve court processes to companies by serving them in their registered office.

EFFECT OF THE REGISTERED OFFICE

According to **Section 104 of CAMA,** a court process shall be served on a company in the manner provided by the rules of court and any other document may be served on a company by leaving it at, or sending it by post to, the registered office or head office of the company.

In a plethora of cases, the court has held that a court process meant for service on a corporate entity must be served at the registered office or head office and not on a branch office. This was held in **Kraus Thompson Org. v UNICAL, Multichem Ind. Ltd v Musa, Tony Anthony (Nig) Ltd v N.D.I.C** and **NBC v Ubani.**

A court process that is not served at the registered office of a company constitutes a breach of service and where there is a breach of service or improper service, there is no service at all. Where there is no service at all, the court cannot proceed to entertain the suit or to hear the application that was not served on the other side.

Service of a court process confers jurisdiction on the court to proceed with the matter. Where there is a lack of service, it robs the court of the jurisdiction to hear the matter or application. Lack of service constitutes a fundamental vice and where the court proceeds to hear the matter, the proceedings and judgments amount to a nullity no matter how well conducted or brilliantly decided.

As was held in the case of **Mark v Eke,** the party entitled to be served but not served is entitled to ex debito judiciae to apply to have the whole proceedings including the judgment set aside as a nullity.

Additionally, all letter heads used for communication by the company must hear the address of the head office. And any change in the registered address of the company must be communicated to CAC.

OBJECT CLAUSE-

The third clause of the memorandum is known as the objects clause. This clause must state the nature of the proposed business which the company seeks to embark upon. If the company is not formed for the purpose of carrying on any business, this third clause must state the nature of its objects.

The purpose of the object clause, as was stated by Lord Wrembry in **Cotman v Brougham,** is two-fold:

1. The first is that the intending corporator who contemplates the investment of his capital should know within what field it is to be put at risk.
2. The second is that anyone who shall deal with the company shall know without reasonable doubt, whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects.

Hence, according to Lord Wrembry, the 3rd clause therefore, must show with a great certainty, the areas or spheres of business which the company might wish to accomplish or pursue. A company is usually incorporated for certain specified objects or purposes and has no powers to do anything which is not within the stated objects or incidental thereof.

It should be noted that, as was stated by the court in the case of **Edokpolo & Co Ltd v Sem-Edo Wire Industries Ltd,** the object clauses are no more than a list of the objects the company may lawfully carry out.

THE DOCTRINE OF ULTRA VIRES

When a company does any act which is beyond the objects set out in its memorandum of association, such act is said to be ultra vires the powers of the company. The effect is that the act is void. This position is not altered by the fact that all the members approved it.

The rule of law at common law was that a company is required to carry on businesses and pursue objects as provided in its memorandum. This rule

was aimed at protecting investors in the company as well as the company's creditors. As a result of this, under common law, where a company enters a transaction outside the ambit of its memorandum, then under the common law that transaction will be Ultra Vires and of no effect.

Whatever is not within the objects of the company as stated in the objects clause is therefore ultra vires the company or it is beyond its powers and it is illegal for the company to do it.

This is consistent with **section 44(1) of the CAMA,** which provides that a company shall not carry on any business expressly prohibited by its memorandum, and shall not exceed the powers conferred upon it by the memorandum and the Act.

The Ultra Vires doctrine was laid down in the case of **Ashbury Railway Carriage Co. Ltd. v Riche.** In the case, the objects of the company were to make and sell or lend or hire railway carriages and wagons, and all kinds of railway plants.

A contract to finance the construction of a railway in Belgium was entered into by the directors with the defendant. Subsequently, the company repudiated the contract and pleaded it was ultra vires. When sued, the court held that the company was not liable the contract was ultra vires the directors and the company and since it was therefore void and not voidable, the whole body of shareholders could not ratify it.

A distinction was made in that case between acts which are merely ultra vires the directors i.e. beyond the powers delegated to them in the article

and acts which are ultra vires the company itself i.e. beyond the powers of the company in the memorandum of association. The former could be ratified but not the latter.

RATIONALE BEHIND THE DOCTRINE

The doctrine was said to be necessary for the protection of investors who might be investing in the company, so that someone who invested in a food company will not found himself in hotel business. The second rationale had been that it is necessary in order to alert and notify third parties dealing with the company to know the scope of the business of the company.

EVASION OF THE ULTRA VIRES DOCTRINE

In view of its effects, the ultra vires rule could hardly be said to protect the creditors and shareholders of the company. Instead, it worked untold hardship on them and prevented the company from exploiting good business opportunities and advantages which might present itself to the company in the course of its business.

Due to the restraint placed on companies by the object clause, companies devised insidious means by way of generally worded drafting which enabled them to evade the effect of the ultra vires doctrine. Instead of setting out the objects clearly and precisely, the practice grew to stating also every conceivable business which the company might remotely wish to undertake in the future.

Hence, instead of an incidental and reasonably interpretation, the companies loaded the objects clause with all conceivable objects and powers. In effect, the objects were as many as possible, and the company need not even attempt some of the listed businesses, but it was to avoid the ultra vires doctrine.

The effect of this according to the court in **Attorney General v Great Eastern Railway Company,** was that the object clause became very long, verbose and contained many kinds of objects and powers with the consequent disadvantages.

Take for instance in **Bell House Ltd v City Wall Properties,** the object clause of the company provided for the power to carry on any business which in the opinion of the directors would be beneficial to the general business of the company. The court upheld it.

Also in **Cotman v Brougham,** while the object clause enabled the company to carry on any kind of conceivable business, it also stated that every clause therein was to be construed as substantive and not limited by the other, the effect being that all were independent and could not be restricted by another. The court also gave effect to it.

DEVICES USED BY THE COURTS UNDER COMMON LAW TO ADDRESS THE ISSUE OF EVASION OF THE ULTRA VIRES DOCTRINE

1. Main object rule of construction (Ejusdem Generis Rule):

By this rule, the ejusdem generis canon of interpretation which holds that where a specified word is followed by a general word, the latter is deemed to be limited to the things of the kind already specified, was applied. Thus where the main business or object of a company is stated first, every other object was interpreted as being exercisable only for the attainment of the main object.

This rule states that if the object clause states the objects for which a company is formed, the wide or sweeping clause (omnibus) at the bottom of the object clause will be interpreted or construed for the attainment or fulfilment of the clauses that have been itemised.

Hence, out of a multiplicity of objects in a memorandum, the court will pick out the main objects and strike out others which do not fit in. The subsidiary clauses that follow main object will be treated as incidental objects which are meant to facilitate the carrying on of the main object.

In the case of **Cotman v Brougham,** an object clause had 30 subclauses. It enabled the company to carry out every conceivable business. The first clause enabled the company to carry out rubber plantation business but the 12th clause enabled it to deal with stocks of a company.

There was a declaration that every clause should be construed as substantive and not limited by the other. The company underwrote and allotted its shares in an oil company. It was held by the court that the memo must be construed according to the literal meaning and that the court will not allow the wide interpretation of the sweeping clause. It has to be held in line with the other objects that have been itemized.

However, it should be noted that the memorandum in the above case concluded that 'each clause shall not be restricted or limited by the name of the company and that no clause shall be treated as subsidiary to the first clause." As a result, the House of Lords in England upheld the clause though general, as valid, and therefore any act based on it was held to be valid.

Furthermore, in **Re introduction ltd,** the main object of the company was providing services for overseas visitors, other clauses provided for the carrying on of any other business which in the opinion of the directors would be beneficial to the main business of the company, but pig breeding was not expressly mentioned.

At some point later, the company ventured exclusively into pig breeding and sought to borrow money for it, but the court held it was ultra vires.

Also in **Continental chemist ltd v Ifeakandu,** the main object of the company was to import, export and sell drugs.

The memorandum also added that the company can do all such business and things as may be incidental and conducive to the attainment of the above objects and powers or any of them.

The parties made a contract whereby the company agreed to educate the defendant to become a medical doctor and he agreed to serve and to practice under them on a certain salary. After he qualified, he practiced in their clinic.

The parties fell out, and the defendant resigned and the company sued for breach of contract. The court found the company was running hospital business which they had no power to do under their objects and dismissed their claim.

However, to fight against this rule, the companies made use of the Independent Object clause. This clause declared that each of the objects were to be construed as independent of and in no way limited by another.

For instance, in the case of **Cotman v Brougham***,* a company's memorandum contained about thirty clauses dealing with a variety of businesses it will engage in. the clauses were drawn in such a way that the company could engage in anything at all.

To forestall the application of the rule, the memorandum concluded that 'each clause shall not be restricted or limited by the name of the company and that no clause shall be treated as subsidiary to the first clause."

The House of Lords in England upheld the clause though general, as valid, and therefore any act based on it was held to be valid.

Another way companies tried to evade the rule is by the use of subjective clauses. This clause gave the directors opportunity to decide on any type of business and whatever business they engage in, is within the objects of the company. This was seen in the case of **Bell Houses Ltd. v City Wall property Ltd.**

2. The companies, due to the main object rule, started stating that each clause should be interpreted independently and that none should be construed as being dependent on each other.

Hence, the court created the second rule which states that when the main object of a company fails, then the substratum of that company will have failed and the company will need to wind up.

For instance in **Re German date coffee co,** the company was incorporated for the purpose of manufacturing a coffee substitute out of dates. In order to do this, it was the first object of the company to acquire a German patent. It turned out that the German Empire would not grant the patent to the company. Hence, the company purchased a Swedish patent and resumed business. Many of the shareholders withdrew when they figured that the German patent was not being used. On the petition for winding up by the members of the company, it was held that the main object of the company had failed and hence, the whole substratum of the company would need to have failed and once the purpose failed, the shareholders were entitled to pull out of the company.

However, this rule has some limitations. For instance, where the whole substratum has failed, if within the object clause, there are still clauses that can cover the activities of the company, such clause will not fail and the activities will not be ultra vires. What this means is that where the whole substratum has failed, the activities of the company will not be ultra vires provided that there are some clauses in the memo that can still contain it.

Hence, in the case of **Re Kitson Co. Ltd,** in this case, the company was formed for the purpose of acquiring a particular business as a going concern. They also included that the company was permitted to carry on the business of general engineering. The court held that the subsequent disposal of that on-going business that they acquired as a going concern will not stop them from carrying on the business of general engineering, because the business of general engineering was covered by some clauses in the memorandum.

THE ULTRA VIRES DOCTRINE UNDER THE CAMA

The common law position subsisted up until the introduction of the CAMA in 2020. Hence, by virtue of **Section 44(1) of the CAMA,** a company shall not carry on any business expressly prohibited by its memorandum and shall not exceed the powers conferred upon it by its memorandum or by the Act.

Hence, the ultra vires rule is retained in **section 44** but largely as an internal matter between the company, the directors, members and creditors.

If a company has done an act or engaged in a transaction outside its authorized business or objects, that act or transaction is valid. In other words, wholly executed ultra vires transactions are valid. It is immaterial that the other party knew that the company is exceeding its objects.

Hence, according to **Section 44(3),** notwithstanding the provisions of subsection (1), no act of a company, conveyance or transfer of property to

or by a company shall be invalid by reason of the fact that such act, conveyance or transfer was not done or made for the furtherance of any of the authorised business of the company or that the company was otherwise exceeding its objects or powers.

However, as was provided under **Section 44(2),** if there is any breach of **Section 44(1),** such breach may be asserted in any proceeding undersections 344-358 of this Act or under subsection (4) of this section.

According to **Section 44(4),** on the application of—

(*a*) any member of the company, or

(*b*) the holder of any debenture secured by a floating charge over all or any of the company's property or by the trustee of the holders of any such debentures,

the Court may prohibit, by injunction, the doing of, any act, conveyance or transfer of any property in breach of subsection (1).

In other words, ultra vires transactions that are executor can be stopped upon an application of persons envisaged by **Section 44(4) of the CAMA.**

According to **Section 44(5),** if the transactions sought to be prohibited in any proceeding under subsection (4) are being, or are to be performed or made pursuant to any contract to which the company is a party, the Court may, if it deems the same to be equitable and if all the parties to the contract are parties to the proceedings, set aside and prohibit the performance of such contract, and may allow compensation to the company or to the other parties to the contract for any loss or damage

sustained by them by reason of the setting aside or prohibition of the performance of such contract but no compensation shall be allowed for loss of anticipated profits to be derived from the performance of such contract.

RESTRICTION OF POWER CLAUSE: According to S**ection 27(1)(d) of the CAMA**, the memorandum of association must also contain the restrictions, if any, on the powers of the company.

This provision is important because a company upon incorporation has all the powers of a natural person of full capacity, as stated in **Section 43(1) of the CAMA**, which provides that except to the extent that the company's memorandum or any enactment provides, every company shall for the furtherance of its business or objects, have all the powers of a natural person of full capacity.

TYPE OR STATUS CLAUSE: This clause states whether the company is a public or private company. According to **section 27(1)(e) of the CAMA**, the memorandum of association shall also state the status of the company, that is whether it is a private or public company as the case may be.

LIMITED LIABILITY CLAUSE: This states that the liability of members is limited by shares or guarantee. **Section 27(1f)** CAMA requires the memorandum of a company limited by shares or of a company limited by guarantee to state that the liability of members is limited. The limited liability

clause is very important because it is a fundamental right of members who subscribed or bought into the company on the understanding that this right cannot be abrogated by the company or by majority shareholders.

SHARE CAPITAL: The memorandum of a company limited by shares must have a capital clause which, according to **Section 27(2a),** must state the amount of the minimum issued capital, the number of shares into which it is divided and the amount of each share. For a public company, the minimum issued share capital is two million, for a private company, it is one hundred thousand.

It should be noted that according to **Section 124 (1&2),** a company cannot be registered unless it has the minimum issued share capital.

AMOUNT OF SHARES: The shares must be divided into a fixed amount and this is shown in the memorandum of association. This amount must be expressed in monetary value, thus making it impossible to issue no par value shares.

ASSOCIATION OR SUBSCRIPTION CLAUSE: The subscription clause (which is usually not numbered) is the concluding part of memorandum. The subscribers usually declare in the clause that they desire to be formed into a company, and agree to take shares and stating their names, addresses, occupation and number of shares taken by each subscriber.

SUBSCRIPTION OF A MEMORANDUM

The memorandum must be signed by each subscriber in the presence of at least one witness who must attest the signature, but a person's name may be subscribed by an agent."

According to **section 27(3) of the CAMA**, where a subscriber holds in whole or part any shares subscribed by him in trust for another, he shall disclose that fact and the name of the beneficiary in the memorandum of association.

The subscribers may all be nominees of the same person who may be virtually the owner of the business, the others having only a nominal interest. Each subscriber must write opposite to his name the number of shares he takes. A legal person may be a subscriber provided he or it is not prohibited under **Section 20 of the CAMA**

ARTICLES OF ASSOCIATION

The articles and memorandum of association are expected to be stamped together at the CAC. It is compulsory to register the articles of association.

EFFECT OF MEMORANDUM AND ARTICLES OF ASSOCIATION

According to **Section 46(1) CAMA,** the memorandum and articles, when registered, shall have the effect of a deed between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles as altered in so far as they relate to the company, its members or officers.

The effect of this provision, as stated by the court in the case of **Wood v Odessa Waterworks,** is that the memorandum and articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other.

PROMOTERS

A promoter is defined under **S. 85 of CAMA 2020** thus:

Any person who undertakes to take part in forming a company with reference to a given project and set it going and who takes the necessary steps to accomplish that purpose, or who, with regard to a proposed or newly formed company, undertakes a part in raising capital for it, is deemed a promoter of the company.

However, the same section notes that a person acting in a professional capacity for persons engaged in procuring the formation of the company shall not be deemed to be a promoter.

According to the court in **Twycross v Grant** (the locus classicus for the definition of a promoter)**,** promoters not only provisionally formed the company, but were also to end its creators, they found and qualified the directors, prepared the prospectus, paid for its printing, and advertised the undertaking before the whole world.

From the definition under **Section 85,** acts which may constitute a person a promoter are two-fold. Hence, the**:**

1. The first arm of the provision relates to a person who undertakes to take part in forming a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose. This is in line with the definition proffered by the court in **Twycross v Grant.**

2. Any person who, with respect to a proposed or newly formed company, undertakes a part in raising capital for it.

In order to be a promoter, a person need not to have taken part in the entire process of forming the company. It is enough if he takes part in only one aspect of it. E.g. a person may become a promoter if he does any of the following things:

1. Arranges for the preparation of the memo and articles of association
2. Negotiates an agreement for the purchase of property by the company

3. Obtains directors for the company
4. Agrees to place shares for the company
5. Procures capital for the company
6. Prepares a prospectus for the company.

A person becomes a promoter from the very moment that he begins to take part in forming a company or in setting it going. A person may also be deemed a promoter even after the formation of a company if he undertakes a part in raising capital for the newly formed company.

According to the court in **Gluckstein v Barnes,** a person who buys property with a view to having a company formed to take it over is a promoter.

The court is of the view that a promoter is neither a trustee or an agent of the company, but he occupies a fiduciary position to the company. This was the position of the court in **Garba v Sheba International Ltd.**

NB: A person may become a promoter even after the company is incorporated. Hence, as was held in **Emma Silver Mining Co Ltd v Lewis,** a person who assists in procuring capital for the company with which the company embarks on its business is a promoter.

However, it should be further noted that a person who took no active part in the formation of a company nor raised capital for it but left others to form the company on the understanding that he would profit from the formation

would be deemed a promoter. This was held in **Emma Silver Mining Co Ltd v Lewis.**

PERSONS ACTING IN PROFESSIONAL CAPACITY CANNOT BE PROMOTERS

It should be noted that the effect of the **proviso to section 85 of the CAMA** is that a person acting in a professional capacity for persons engaged to procure the formation of a company shall not be deemed to be a promoter.

Thus, while a person who instructs a solicitor to prepare a memorandum and articles of association and register a company for him is a promoter of the company, the solicitor himself is not a promoter because he acts in a professional capacity and is paid by his client "the promoter" for such services.

In **Re Great Wheal Polyglot ltd,** the court noted inter alia that the solicitor who drafts the memorandum and articles of association in line with the promoters instruction, and the accountant who values the assets of a business are only giving expert assistance to the promoter, and will be paid for their services, they are not promoters.

However, according to the court in **Bagnall v Carlton,** where the solicitor or accountant does more, such as helping the client to obtain director for the company, he will be regarded as a promoter.

Thus, these people are not promoters:

1. Estate valuer
2. Auditor
3. Legal practitioner
4. Accountant

The same principle applies to companies, because it is possible for an existing company to be a promoter of another new company. However, if the former merely acts in professional capacity, such as providing valuers and preparing figures on behalf of a promoter and is paid by the promoter, it cannot be said to be a promoter, but if the existing company does more than that, then it dresses itself with the apparel of being a promoter of the new company.

DUTIES OF A PROMOTER

1. He stands in a fiduciary relationship to the company and shall observe utmost good faith towards the company – **S. 86 (1).** This was held by the court in **Erlanger v New Sombrero Phosphate Co**. Hence, a promoter who acquired any property or information in circumstances in which it was his duty as a fiduciary to acquire for the company shall account to the company.

2. A promoter is not expected to may any secret profit in his dealing with the company. This was held in **Whaley Bridge Calico Printing Co Ltd v Green.** According to **section 86(2) of the CAMA**, the promoter

is bound to account for any profit made by the use of any information or property which it was his duty as a fiduciary to acquire on behalf of the company.

In **Jubilee Cotton Mills v Lewis**, it was held that a promoter who had received by way of secret rewards for promoting a company, allotment of shares before a statement in lieu of prospectus, was bound to account for profit made from the resale of the shares.

3. He has a duty to disclose any interest he has in dealings with the company. A promoter must disclose to the company any interest which they have in dealing with the company.

In **Erlanger v New Sun Sombrero Phosphate Co**, the court suggested that the promoters must ensure that the company had an independent board of directors to whom disclosure should be made.

In the instant case, the promoter and his syndicate bought a land containing valuable mines of phosphate at 55,000 pounds and made a contract via a nominee with the company to buy it at the rate of 110,000 pounds. The court held that the company could rescind from such a contract.

Disclosure must be to an independent board of directors or to the members of the company as a whole. This disclosure must be a full disclosure. Prevaricating or tell half-truth is not enough and partial disclosure is

insufficient. It is not also enough merely to furnish information from which the secret profit or promoter's interest could be deduced.

According to **section 86(3) of the CAMA** , any transaction between a promoter and the company may be rescinded by the company unless, after full disclosure of all material facts known to the promoter, such transaction shall have been entered into or ratified on behalf of the company by —

(a) The company's board of directors independent of the promoter ;

(b) All the members of the company ; or

(c) the company at a general meeting at which neither the promoter nor the holders of any share in which he is beneficially interested shall vote on the resolution to enter into or ratify that transaction.

4. A promoter is not entitled to any compensation for whatsoever he did for the company before incorporation. He is only entitled to the receipt of the preliminary expenses made towards the incorporation of the company. This was held in **Garba v Sheba Int. Nig ltd.**

REMEDIES FOR BREACH OF FIDUCIARY DUTY TO THE COMPANY

1. Rescission
2. Account for profit
3. Damages

1. ACCOUNT FOR PROFIT

The company may recover any secret profit made by the promoter. In **Gluckstein v Barnes,** a syndicate purchased a property for 140,000 dollars, but sold it to the company to be formed which they were promoting for 180,000 dollars. They only disclosed half of the profits but the company found out via a public issue of shares that profit in excess of that disclosed were made by them. They were held to account. They were also bound to pay the 20,000 pounds to the company.

In estimating the amount of secret profit for which the promoter is accountable to the company, he may be allowed the legitimate expenses which he incurred in forming the company. For example, cost of surveyor's report, charges of solicitors and bankers, cost of advertisement etc. But this does not include money spent in obtaining from another a guaranty for taking shares as was held in **Lydney Wigpool Iron Ore Co v Bird.**

If the secret profit arises from a sale by the promoter of her own property to the company in return for shares in it and the promoter has sincerely sold the shares, the amount recoverable from him as secret profit is the difference between the price he paid for the property and the amount for which he sold the share. This was held in **Emma Silver Mining co Ltd v Lewis.**

However, if the property in respect of which the secret profit was made was acquired by the promoter before he became a promoter, then the company

cannot recover it from him though the company may rescind the transaction if restitution in integrum is still possible. This was held in **Jacob Marker Estate Ltd v Marler** and **Re Ambrose Lake Tin Company.**

RESCISSION

The company may rescind the contract and recover any consideration paid for it. The right to rescind is governed by the general law of contract i.e. the company must not have ratified the contract after discovering the misrepresentation or non-disclosure and additionally, restitutio ad integrum must still be possible. This was held in **Lagunas Nitrate Co v Lagunas Syndicate** and **Re leads v Handley Theater of Varieties.**

Accordingly, a company cannot rescind if it has sold the property as was the case in **Re Capebreton Company** or if the property is leasehold land which has been forfeited by the land lord as was the case in **Lady Well Miming Co v Brooks.** The shareholder of a company may also resolve to waive the right of rescission as was the case in **Re Capebreton Company.**

DAMAGES

A company may sue the promoter for breach of his fiduciary duties and claim damages. This was held in **Re Leeds v Handley Theatre of Varieties ltd.**

NB: According to **section 86(4) of the CAMA**, there's no limitation period to when a company may bring an action against a promoter to enforce any rights , although the court may if it deems it equitable to do so, with regards to the circumstances of the case including lapse of time, relieve the promoter either in whole or part of liability.

REMEDIES AVAILABLE FOR DIRECTORS

1. Damages
2. Compensation
3. Injunction
4. Declaratory judgement

REMUNERATION OF PROMOTERS

According to the court in **Garba v Sheba Nig ltd,** a promoter has no right against the company for payment of services rendered before the incorporation of the company and that a promise to pay him by the company is not binding and is not enforceable against the company because the consideration is a past consideration.

However, a promoter may only recover from the company what he has paid in preliminary expenses if the company ratifies any contract to that effect after being incorporated. Furthermore, a promoter can also be remunerated indirectly, by offering him fully paid up shares via the instrument of founder

shares or by offering him deferred shares of which he may pay at any time for the original amount whether or not the value increases.

WAYS PROMOTERS CAN BE PAID

Ordinarily, a promoter is not entitled to payment. However, they have different ways that they are paid by the company such as receiving deferred or founder's shares, or receiving premium shares at a nominal value.

1. Issuing them deferred or founder's shares
2. Issuing them premium shares at a nominal value.
3. The promoters can also decide to buy a property and sell it at a higher rate to the company that is formed provided that he makes a full disclosure of his profits.

PRE-INCORPORTION CONTRACTS

These are contracts entered into by a company before it is incorporated. Most times, these contract are negotiated and entered by the promoters on behalf of the company.

Examples of pre-incorporation contracts:

1. Director service contracts

2. Joint venture agreement
3. Shareholder agreement
4. Contract for payment of promoter expenses
5. Contract to take over a business
6. Contract for conversion of partnership into an incorporated company.

DIRECTOR SERVICE CONTRACT:

It is usually the promoters that look for directors for the company. They shop for persons that will put the company in high reputation.

A director's service contract is a contract between a company and a director that sets out the terms of the director's employment. It is similar to an employment contract for an employee, but it also includes provisions specific to directors, such as their duties and responsibilities, their compensation, and their termination rights.

Under this contract, the function and benefits of the executive directors are provided. They also provide for terms of his service and how his contract will be terminated. The director service contracts are made by the promoters and are binding on the director so employed after agreeing and appending his signature on the contract. The director can object to some of the provisions made so that they can be adjusted.

SHAREHOLDERS AGREEMENT:

This is a contract between the shareholders of a company that sets out the terms and conditions of their relationship. The promoters draft this contract for shareholders, and upon incorporation, the shareholder can choose not to be bound by what was outlined by the promoters of the company. But when they agree to it, they become bound.

JOINT VENTURE AGREEMENT:

A joint venture agreement is a contract between two or more parties that agree to pool their resources and expertise to undertake a specific business project. It typically specifies the purpose of the joint venture, the contributions of each party, the management structure, and the division of profits and losses.

The promoters can enter into a joint business with another company in order to execute a project. Under this agreement, they will venture into that business and state the ratio of which profit will be shared. The promoters enter into agreements of such on behalf of the company.

CONTRACT TO TAKE OVER A BUSINESS:

A contract to take over a business, also known as a business transfer agreement, is a legal document that outlines the terms of the sale of a business from one party (the seller) to another party (the buyer). The agreement typically includes details such as the purchase price, the assets and liabilities being transferred, the payment terms, and the closing date.

It may also include provisions for things like warranties, indemnification, and non-competition.

A promoter may enter into a contract to form a company in which, after some time, other persons may take over the company. These agreements can be made by the promoters on behalf of the company before its formation.

CONTRACT FOR PAYMENT OF PROMOTER'S EXPENSES

A contract for payment of promoter's expenses is a document between a promoter and a company that outlines the terms and conditions under which the company will reimburse the promoter for expenses incurred in promoting the company before it was incorporated.

CONTRACT TO PURCHASE A PROPERTY

A contract to purchase a property, also known as a purchase and sale agreement (PSA), is a legally binding document between a buyer and seller that outlines the terms of a real estate transaction. It includes the purchase price, closing date, financing terms, and any contingencies that must be met before the sale can go through.

CONTRACT FOR CONVERSION OF A PARTNERSHIP INTO AN INCORPORATED COMPANY

This is a legal document that outlines the terms and conditions of the conversion.

THE COMMON LAW PROVISION

The common law position was that such contracts are not binding on the company when it is formed even if the company takes any benefit under it before incorporation. This position is predicated on the principle that before incorporation, a company has no contractual capacity, neither can anybody contract as an agent for it because an agent cannot do something which his principal cannot do.

Before now, it was stated that a company cannot enter into a contract before its formation because it has no capacity to enter into such a contract before incorporation as it does not exist at that point. Hence, promoters could enter into a contract on behalf of the company but were held personally liable pending when the company had been incorporated and had officially ratiied that action.

According to the court in **Howard v Patent Ivory manufacturing company**, the so called pre-incorporation contracts by promoters and agents of a company are not contracts binding on a company, for the company had then not been in existence, and there cannot be in law an effectual ratification by the company of a contract which was made when it was not in existence.

Furthermore, up until 1990 when the Companies and Allied Matters Act was enacted, such a contract could not be ratified by the company after its incorporation. This was held in **Kelner v Baxter, Caligara v Giovani Santori & Co** and **Nathal Land CO v Pauline Syndicate.**

In the case of **Nathal Land CO v Pauline Syndicate,** the court stated the common law view thus:

It is clear that a company cannot by adoption or ratification, obtain the benefits of a contract purporting to have been made on its behalf before the company came into existence. In order to do so, a new contract must be made with the company after its incorporation on the terms of the old one.

In **Kelner v Baxter**, the rationale behind the common law provision was stated. The court held that if a person contracts ostensibly as an agent for a non-existent principal, he may be held personally liable.

Hence, since a company that is not incorporated does not have a legal personality, it was deemed under common law to be a non-existent principal, and as thus, the other party to the pre-incorporation would have to be personally liable.

Before 1990, to make a pre-incorporation contract effective, promoters adopted either of two clauses:

a. The promoters may prepare a draft agreement to which the company is expressed to be apart and provide in the object clause that the company shall enter into a contract in terms of the draft.

b. The contract can be made with someone as trusted for the company and after incorporation, the company enters into a new contract with the other party and the trustee drops out.

THE STATUTORY PROVISION FOR PRE-INCORPORATION CONTRACTS

Sec 96 of CAMA 2020 provides that pre incorporation contracts can be ratified by the company after its formation. And after ratification, the company becomes bound to the agreement or contract made. They become bound to the obligations and also entitled to the benefits after the ratification of such contract, as if they had entered into the contract ab initio.

However, **S. 96(2)** provides that the persons who purported to act on behalf of a company shall, in the absence of express agreement, be personally bound by the contract or other transaction. Hence, prior to ratification by the company, the person who purported to act in the name or on behalf of the company shall in the absence of an express agreement to the contrary be personally bound by the contract and be entitled to the benefit thereof. This implies that the contracting party acting on behalf of the yet to be incorporated company is deemed to have personally and beneficially entered into the contract notwithstanding the fact that he gave the impression that he was acting as an agent. This was held in **E.T and E.C Nig Ltd v Nevico.**

Hence, by virtue of **S. 96,** any contract or other transaction purporting to be entered into by the company by any person on behalf of the company before its formation may now be ratified by the company after it had come into existence.

Where such ratification is made, that fact retrospectively operates to bind the company to the contract or other transaction and entitles the company to any benefit thereunder as if the company had been in existence at the date of such transaction or other transaction had been a party thereto.

EFFECT OF RATIFICATION

According to the court in **S.G.F v S.G.B Nig Ltd,** it is now possible for pre-incorporation contracts to be ratified by a company after its incorporation and thereby making the company bound by it and entitled to the benefit thereof.

And as to its effect, according to the court in **Garuba v K.I.C Ltd,** before a company can become bound by any contract or transaction entered on its behalf before its formation, there must be evidence of ratification by the company upon its formation.

This ratification is done in the statutory meeting which, as provided under **Section 235,** every company is expected to have six months after being incorporated. The said section provides that a company shall hold a statutory meeting that must be within 6 months of its incorporation and a statutory report must be made known which shall include the pre-

incorporation contract that has been ratified by it. And this is usually reached by a resolution made by the members and other officers in the meeting.

So, in order to prove that a company has ratified a pre-incorporation contract, the evidence that will be presented to the court is the resolution reached by the company addressing the ratification and this resolution can be obtained using the statutory report. The only proof that a company would be bound by the pre-incorporation contract would be the resolution made at the statutory meeting showing that the company has ratified the contract.

In the case of **Garuba v KIC Ltd,** the court held that a company can only be bound by a pre-incorporation contract when evidence of ratification has been produced.

But until ratification by the company, any person who claims to have entered into a contract on behalf of the company before its formation is presumed to have done so personally. This was held in **E.T & E.C Nig ltd v Nevico Ltd.**

WHERE PRE-INCORPORATION CONTRACTS ARE INSERTED INTO THE OBJECT CLAUSE OF THE MEMORANDUM

According to the court in **Edokpolo v Sem Edo Wires Industries**, the list of objects in a memorandum are certainly not things the company must execute, the inclusion of the terms of the pre-incorporation contract in the

memorandum of association of a company is an indication of a strong desire that the proposed company after incorporation should execute the terms of the agreement so included.

REGULATION OF CORPORATE AFFAIRS COMMISSION AND SECURITIES AND EXCHANGE COMMISSION

The principal legislation for the regulation of companies, partnerships etc., is the Companies and Allied Matters Act.

The act makes provisions for;

a) Establishment and functions of Corporate Affairs Commission under Part A.

b) Incorporation of companies and incidental matters under Part B.

c) The limited liability partnership under Part C.

d) The limited partnership under Part D.

e) Business names and registrations, under Part E.

f) Incorporated trustees under Part F.

g) Establishment of Administrative proceedings committee(General) under Part G.

The statutory body created for the administration of CAMA is called the Corporate Affairs Commission

S.1 CAMA establishes the CAC. It provides that

S. 1(1) - There is established the Corporate Affairs Commission.

S. 1(2) - The Commission—

(*a*) is a body corporate with perpetual succession and a common seal ;

(*b*) may sue and be sued in its corporate name ; and

(*c*) may acquire, hold or dispose of any property, movable or immovable, for the purpose of performing its functions.

S. 1(3) - The headquarters of the Commission shall be in the Federal Capital Territory, Abuja, and there shall be established an office of the Commission in each State of the Federation.

S. 2 CAMA establishes the governing board of the CAC. The representatives shall be appointed by the minister of commerce, trade and investment.

It provides that:

The Board shall consist of—

(a) a chairman who is appointed by the President on the recommendation of the Minister,

(b) one representative of the—

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

(ii) legal profession, appointed by the Minister on the recommendation of the Nigerian Bar Association,

(iii) accountancy profession, appointed by the Minister after consultation with professional bodies of accountants as are established by Acts of the National Assembly,

(iv) Institute of Chartered Secretaries and Administrators of Nigeria, appointed by the Minister on the recommendation of the Institute,

(v) Nigerian Association of Small and Medium Enterprises, appointed by the Minister on the recommendation of the Association,

(vi) Manufacturers Association of Nigeria, appointed by the Minister on the recommendation of the Association,

(vii) Securities and Exchange Commission not below the rank of a Director or its equivalent, and

(viii) each of the Federal Ministries of Industry, Trade and Investment, Justice and Finance who shall not be below the rank of Director ; and (c) the Registrar-General of the Commission.

THE FUNCTIONS OF THE GOVERNING BOARD – S. 4

The functions of the governing board of the CAC are provided under **S. 4 CAMA.** It provides that:

The Board shall—

(a) review and provide general policy guidelines for performing of the functions of the Commission in accordance with international commercial best practice ;

(b) have general oversight on the administration of the Commission ;

(c) review and approve the strategic plans of the Commission ;

(d) receive and consider management reports and advise the Minister on the reports ;

(e) determine the terms and conditions of service of employees of the Commission ;

(f) fix the remuneration, allowances and benefits of employees of the Commission, in consultation with the National Salaries, Income and Wages Commission ;

(g) ensure compliance with the provisions of this Act ; and

(h) do such other things as are necessary to ensure the effective and efficient performance of the functions of the Commission.

THE FUNCTIONS OF THE COMMISSION- S. 8 CAMA

The functions of the commission are provided under **S. 8 CAMA.** It provides that:

The functions of the Commission shall be to—

(a) administer this Act, including the registration, regulation and supervision of—

(i) the formation, incorporation, management, striking off and winding up of companies,

(ii) business names, management and removal of names from the register, and

(iii) the formation, incorporation, management and dissolution of incorporated trustees ;

(b) establish and maintain a company's registry and office in each State of the Federation suitably and adequately equipped to perform its functions under this Act or any other law ;

(c) arrange or conduct an investigation into the affairs of any company, incorporated trustees or business names where the interest of shareholders, members, partners or public so demands ;

(d) ensure compliance by companies, business names and incorporated trustees with the provisions of this Act and such other regulations as may be made by the Commission ;

(e) perform such other functions as may be specified in this Act or any other law ; and

(f) undertake such other activities as are necessary or expedient to give full effect to the provisions of this Act.

THE CAC AND PRE-ACTION NOTICE

To sue the CAC, you have to give them a pre-action notice for 30 days prior to bringing an action in court. The pre-action notice must be written.

According to **section 17(1) of CAMA**, a suit shall not be commenced against the Commission before the expiration of 30 days after a written notice of intention to commence the suit is served upon the Commission by the intended plaintiff or his agent.

STATUTORY CONTENTS OF A PRE-ACTION NOTICE – S. 17 CAMA

The purpose of a pre-action notice is to put the other party on notice and give them the chance to settle out of court and also to prevent frivolous suits.

The Supreme Court in **Mobil Producing Nig Ltd v Lagos State Environmental Protection Agency (LASEPA)** clarified the position of pre-action notice. The court held as follows:

1. The provisions of pre-action notice are mandatory.
2. Non-compliance with such mandatory provisions must be pleaded and
3. Failure to plead same amounts to a waiver.

Any suit commenced without pre-action notice is an incompetent suit.

Pre-action notice is a novel introduction of **CAMA 2020**. Hence, before the enactment of **CAMA 2020,** there was no requirement of serving a pre-action notice on the Corporate Affairs Commission before bringing an action against them.

SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is a body established by the **Investment and Securities Act 2007 (S. 1)**. Its head office is in Abuja**.**

The SEC regulates the issuing of securities.

FUNCTIONS OF THE SEC – S. 13 ISA 2007

Section 13 of ISA 2007 provides the numerous functions of the Securities and Exchange Commission. It provides thus:

The Commission shall be the apex regulatory organisation for the Nigerian capital market and shall carry out the functions and exercise all the powers prescribed in this Act and, in particular, shall:

(a) regulate investments and securities business in Nigeria

(b) regulate all offers of securities by public companies and entities;

(c) render assistance to promoters and investors wishing to establish securities exchanges and capital trade points;

(d) enter and seal up the premises of persons illegally carrying on capital market operations;

(e) register and regulate corporate and individual capital market operators as defined in this Act;

(f) register and regulate the workings of venture capital funds and collective investments schemes in whatever form;

(g) facilitate the establishment of a nationwide system for securities trading in the Nigerian capital market

(h) facilitate the linking of all markets in securities with information and communication technology facilities;

(i) act in the public interest having regard to the protection of investors and the maintenance of fair and orderly markets

(j) keep and maintain a register of foreign portfolio investments;

(k) levy fees, penalties and administrative costs of proceedings or other charges on any person in relation to investments and securities business in Nigeria in accordance with the provisions of this Act;

(l) intervene in the management and control of capital market operators which it considers has failed, is failing or in crisis including entering into the premises and doing whatsoever the Commission deems necessary for the protection of investors;

The SEC is the apex securities body that regulates the Nigerian Capital market.

DR ONYEKA

1. Forms of business organisation
    - Sole proprietorship
    - Partnership- Limited partnership
    - Incorporated companies
    - Creation and incidence
2. Organs and liabilities of a company

ORGANS OF A COMPANY

The company, even if it is recognized in law as a person, is not a human being but only an abstraction in reality. What brings a company into existence and gives it validity is its registration. Once a company is registered, it becomes a person, that is, the form of artificial person.

However, the company cannot act on its own without the instrumentality of natural persons. It must act through human persons and these persons whom it acts through are known as organs of the company. These human persons will be the brain of the company and carry out the required functions of the company

Generally, the company has three organs: They are:

a) the members in the general meeting,

b) the board of directors. And

c) other officers and agents of the company who act with the authority of the board or members of the general meeting.

According to **section 87(1) of the CAMA**, a company shall act through its members in general meeting or its board of directors or through officers or agents appointed by, or under authority derived from, the members in general meeting or the board of directors. As regards the division of powers, it must be noted that the division of the powers in the general meeting and board of directors must be determined in the articles of association.

Furthermore, **section 87(2) of the CAMA** states that subject to the provisions of this Act, the powers of the members in general meeting and the board of directors shall be determined by the company's articles of association.

S**ection 87(3) of the CAMA** provides that the management powers of the company are vested in the board of directors. It states that the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by this Act or the articles required to be exercised by the members in general meeting.

In essence, it is the primary responsibility of the board of directors to manage the business of the company, it is them that have the power to sue and be sued in the name of the company, they buy, hold and dispose of land in the name of the company, and they may do other necessary acts

not expressly mentioned in the articles or Act in furtherance of the objectives of the company.

In **AVOP PLC v AG Enugu State**, the state government, being a minority shareholder in the company, became infuriated by its operation. Hence, they constituted a panel to investigate the runnings of the company and subsequently appointed a person to take over the management of the company. The court held that such an act by the state government was ultra vires its powers as a minority shareholder and inconsistent with the provisions of the articles of association of the company and particularly **section 87(3) of the CAMA** which vest the management powers of the company in the board of directors.

The law is that the board of directors enjoys a significant degree of independence from the members in the general meeting and so long as they carry out their responsibilities in good faith, the general meeting cannot interfere.

Hence, according to **section 87(4) of the CAMA**, unless the articles otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the articles, is not bound to obey the directions or instructions of the members in general meeting provided that the directors acted in good faith and with due diligence.

1. THE MEMBERS OF THE GENERAL MEETING

The members are different from the shareholders. A shareholder owns a share in that company while members are those that have their names registered as members of that company.

2. The board of directors

The other organs include:

1. The officers
2. The agents

DIVISION OF POWERS BETWEEN MEMBERS AND BOARD OF DIRECTORS- SEC 87 CAMA

These two main organs are the decision making organs of the company and the company carries out its whole function through the two main organs.

Subject to the provisions of the Act, the powers of the members in the general meeting and the board of directors shall be determined by the company's article of association – **87(2)**. This means that, in relation to the powers of members in the general meeting and that of the board of directors, the provision in CAMA supersedes the provisions of the article of

association. Hence, assuming that there is a provision of CAMA for a particular matter and the Article of Association still goes ahead to make a provision on that same matter, that of CAMA prevails.

Except as otherwise provided by the articles of the company, the business of the company, i.e. the day to day running of the company is bestowed on the board of directors and not the members – **87(3).** In relation to **87(3)**, the provision of the article of association supersedes the provision of CAMA. Hence, where the article provides otherwise than what is stated in CAMA, the provision of the article prevails over that of CAMA.

Except as otherwise provided by the articles, the board of directors, as long as they are acting within their power in good faith and due diligence, are not bound to obey the instructions or directions of the members- **87(3).** The members can only interfere when the directors are acting in bad faith and without due diligence.

This provision ascribes independent power on the board of directors, and as regards this section, once the provision of the article states otherwise, that of the article prevails over that of the CAMA.

Notwithstanding the provision of **subsection 3**, i.e., the power bestowed on the board of directors to manage the business of the company, the members in general meeting may (as contained in **S. 87(5)**):

a. Act in any matter if the members of the board of directors are disqualified or unable to act because of a deadlock on the board or otherwise ;

b. Institute legal proceedings in the name and on behalf of the company, if the board neglects or refuses to do so.
c. Ratify and confirm actions taken by the board of directors
d. Make recommendations to the board of directors regarding actions to be taken by the board.

According to Dr Onyeka, the effect of section **87(5)(b) of the CAMA** is analogous to the proper claimant principle, which states that it is the company itself that can sue when it is wronged and not any other member of the company. And if this principle is sustained, the company will usually act through its directors whose management powers of the company are vested. But in instances when it is the board of directors who have committed a wrong or breach against the company, they are not likely to institute an action against themselves, therefore in that case, the members of the general meeting may by section **87(5)(b)** of the CAMA, institute the action on behalf of the company.

The management power of a company resides in the board of directors, and they also have the right to exercise all powers assigned to them in the articles of association. They are independent in the exercise of their powers. And they exercise their powers through a committee or the managing director.

The members at the general meeting are, on the other hand, the superior decision making organ of the company. They are superior to the board of directors. They can ratify the actions of the board of directors. They can also make recommendations to the board of directors.

LIABILITY OF A COMPANY FOR THE ACTS OF ITS PRIMARY ORGANS – S. 89

According to **section 89 of the CAMA**, the company itself is civilly and criminally liable to the same extent as if it was a natural person for the acts of the members in the general meeting, the board of directors or a managing director while carrying on in the usual way the acts of the company.

Hence, as a general rule, the acts of the board of directors, members of the general meeting or the managing director while carrying on the business of the company shall be treated as the acts of the company and the company shall be civilly and criminally liable for those actions.

EXCEPTION: As provided under **Section 89(a and b)**:

a) The company shall not be civilly liable to any person where such person had actual knowledge that the board of directors, members of the general meeting or managing director had no power to act, or had acted in an irregular manner, or having regard to his position and relationship with the company, he ought to have known of the absence of such power or their irregularity.

(b) if in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection with that business merely because the business in question was not among the business authorized by the company's memorandum.

Hence, the company shall not incur civil liability to any person if that person had knowledge that the board of directors, members of the general meeting or managing director did not have the power to engage in those actions or ought to have known such due to the person's relationship with the company.

This exception only applies to civil liability. Hence, the issue of civil liability depends on the knowledge or lack of knowledge of the third party.

LIABILITY OF A COMPANY FOR THE ACTS OF OTHER OFFICERS – S. 90

According to **Section 90(1)**, the acts of other officers or agents of a company shall not be deemed to be acts of the company, unless—

(a) the company, acting through its members in general meeting, board of directors, or managing director, have expressly or impliedly authorized such officer or agent to act in the matter ; or

(b) the company, acting through its members in general meeting, board of directors, or managing director, has represented the officer or agent as having its authority to act in the matter. In such a case, the company shall be civilly liable to any person who has entered into the transaction in reliance on such representation unless such person had actual knowledge that the officer or agent had no authority or unless having regard to his position with or relationship to the company, he ought to have known of such absence of authority.

Hence, as a general rule, the acts of other officers or agents of a company such as the chief executive officer, chief financial officer, secretary etc, are not deemed to be actions of the company.

Except if the company, acting through the board of directors, members of the general meeting or managing director, authorises such officer to act. Or where the board of directors, members of general meeting or managing director did not authorise the officer, but represented such officer as having the said authority.

DIFFERENT FORMS OF BUSINESS ORGANISATION

1. Sole proprietorship
2. Partnership – Limited Partnership, Limited liability Partnership
3. Incorporated companies

SOLE PROPRIETORSHIP-

A sole proprietorship is a one man business wherein the owner undertakes a business in his own name and his own right, he bears both the capital of funding the business and the risks involved in running the business.This is the simplest form of business entity, with the least legal and administrative procedures and costs of implementation.

The sole proprietor has no limit in his liability in the business, the business is as good as him, and there is neither perpetual succession nor corporate existence vested on a sole proprietorship, thus a sole trader is one and the same person with his business. This was held in **Vernon v Schuster.**

When a sole proprietor trades under his own name, he is not required to register his name. But when he trades in another name which is not his own, he is required to register his business name.

REGISTRATION OF NAMES FOR SOLE PROPRIETORSHIP BUSINESS

Ordinarily, there is no legal obligation on sole proprietors to register their business names except when necessary as provided by the Act.

According to **section 814(1)(a)(b) &(c) of the CAMA**, every individual, firm or corporation having a place of business in Nigeria and carrying on business under a business name shall be registered in the manner provided in this part if;

a) in the case of an individual, it does not consist of his true surname, without any addition other than his true forenames or initials thereof.

b) in the case of a firm, it does not consist of the true surnames of all the partners, without any addition other than the true forename of the individual partners or the initials thereof

c) in the case of a corporation, whether or not registered under this Act, it does not consist of its corporate name without any addition.

But according to **section 814(2) of the CAMA,** registration will not be necessary where:

a. the additional name is merely to indicate that the business is carried on in succession to a former owner, or
b. where two or more individual partners have the same surname, and an additional "s" is placed at the end of that surname or
c. where the business is carried out by a receiver or manager appointed by the court.

Putting this into context, With respect to individuals For example, if Mr Gabriel Okoye is running a boutique business with the name Okoye stores or Gabriel stores, or G.O stores, there is no obligation on him to register it. Because the business name consists of his true surname, or his true forename or initials. But where he comes up with a name like Gabby stores or Zayna stores, he is required to register the name under the Act.

THE LEGAL CONSEQUENCES OF DOING BUSINESS AS A SOLE PROPRIETOR WITHOUT REGISTRATION UNDER THE CAMA

1) Non-compliance with registration defeats the act;

2) Illegality;

The business name not registered becomes an illegal enterprise in the eyes of the law. In fact by **section 863(1) of the CAMA,** the carrying of

business names under a business name not registered is prohibited in Nigeria.

3) Liability For Criminal Prosecution;

Non-compliance with registration under the act is a sufficient ground for Criminal prosecution to follow.

4) Payment Of Fine;

Section 863(2) of the CAMA envisages a fine of 200 naira for any person convicted for the offense of carrying on business in Nigeria with an unregistered name. The said fine shall be computed by multiplying the 200 naira by the number of days during which the default continues.

5) Status Of An Ex Convict;

The person or firm or company convicted for non-compliance will usually henceforth be regarded in the commercial world as an ex-convict, and that has some legal disabilities attached.

6) Forced Compelled Registration;

A person convicted aside from the payment of fine shall also be compelled by the court via an order mandating compulsory registration of the business name.

7) No Protection Against Adverse Use of Business Name By Others;

A legal right cannot arise from an illegal cause, thus a person whose business name is not registered cannot for instance maintain an action in passing off or whatsoever against another.

8) Unenforceability Of The Contractual Rights;

Non-registration also attracts the legal consequence that the trader cannot enforce any contractual right arising from a transaction undertaken under such unregistered business name.

PARTNERSHIP

A partnership is a voluntary association or two or more persons who jointly own or carry on a business with the sole aim of making profits.

It defined in **Section 1(1) of the Partnership Act of 1890** as a relation subsisting between two or more persons carrying on business in common to make profit.

The three ingredients inherent in this definition are as follows;

i) There Must Be At Least Two Or More Persons Who Come Together, thus one person cannot be a partner, a partnership must be dualistic or more. But it must not exceed 20 persons. **Section 19(1) of the CAMA** purports that no partnership exceeding 20 persons may carry on business to make profit except if it is registered as a company under the Act or as required by some other enactment. However, **Section 19(2)(b) of the CAMA** exempts legal practitioners, accountants and cooperative societies from the effect of

subsection 1, therefore they may form a partnership exceeding 20 persons for profit.

ii) To Carry On The Business in Common ;

Both or more parties involved in the partnership must own the business. The word, 'business' by **section 868 of the CAMA** has been defined to include trade, industry, and profession and any occupation carried on for profit.

iii) For Profit;

The business in question must be carried on for profit. In **Re fisher & sons**, the executors of the will of a deceased business owner was held not to have come together to carry on business for profit, but rather to discharge their statutory duties as executors, thus they could not be called partners.

The court in **Okin & Anor v Okin** held that the essential element common to all partnerships is the pooling together of resources, capital, labour and skill for the common benefit of the partners. It is created by an agreement which may be express or implied from the conduct of the partners.

Partnership in Nigeria is categorized as; general partnership, regulated by the **Partnership Act of 1890**, and the **Partnership Laws** of various states, the limited partnership and the limited liability partnership both regulated by the **companies and allied matters Act**.

In the case of a firm or partnership, if all partners are trading in their original name or surname they do not need to register.

Some benefits of incorporation your business through a partnership include:

1. The legal and administrative procedures and costs of formation are relatively inexpensive.
2. A partnership provides for the business, the combined labour, expertise, management skills and financial resources of the partners and
3. There is a greater ability to overcome the consequences of disability, sickness or accident of a partner than for a single proprietor.

GENERAL PARTNERSHIP

A partnership under a business name is referred to as a general partnership, as each partner is jointly and severally liable for the debts and obligations of the partnership incurred while he or she is a partner. It is regulated by the **Partnership Act of 1890.**

(Talk about everything in partnership here if there is no avenue to discuss partnership separately).

OTHER FORMS OF PARTNERSHIPS

Part C and D of CAMA 2020 created the limited partnership and limited liability partnership

LIMITED LIABILITY PARTNERSHIP

According to **section 746 of the CAMA,** a limited liability partnership is a body corporate, formed and incorporated under this act and it is a legal entity separate from the partners. It has perpetual succession and any change in its partners does not affect the existence, rights or liabilities of the limited liability partnership.

According to **section 747 of the CAMA**, any individual or body corporate may be a partner in a limited liability partnership, provided that the individual is not of unsound mind and so found by a court to be of unsound mind or an undischarged bankrupt.

LLP is one of the types of partnerships that allows limitation of liability of members. However, unlike the LP, where there are sleeping partners, every partner is involved in the management of the partnership under LLP.

An LLp combines the organisational flexibility and tax status of a partnership with limited liability for its members and entity shielding for creditors. It continues in existence notwithstanding the death or resignation of a member, unlike general partnerships.

An LLP is a legal entity separate from the partners. This means that once the LLP is registered, it can sue and be sued in its own name, it can

acquire, own, hold and develop or dispose of property, whether moveable or immoveable, tangible or intangible, among other lawful acts that a body corporate can do. And where the LLP is held liable, the liabilities of the LLP shall be met out of the property of the LLP and not out of the personal properties of the members.

There is no maximum number of members in a limited liability partnership. However, as stated in **section 748 of the CAMA,** every limited liability partnership must have at least two partners. And if at any time the number of partners is reduced to below two, the only partner being aware of such a fact who carries on the business of the partnership for a period of six months shall be personally liable for the debts and obligations of the limited liability partnership incurred during such period.

Also, as stated in **section 749 of the CAMA**, every limited liability partnership must have at least two designated partners who are individuals and at least one resident in Nigeria. If all the partners are bodies corporate or a mix of individuals and bodies corporate, at least two individuals who are partners of the limited liability partnership or nominees of the bodies corporate, act as designated partners.

Section 750 of the CAMA states that a designated partner is responsible for all acts, matters and things that are required to be done by the limited liability partnership, in compliance with the Act. They are also liable for all penalties imposed on the limited liability partnership for any contravention of the Act.

The LLP agreement between the partners governs the mutual rights and duties of the partners of the LLP, and the mutual rights and duties of the LLP and the partners. In the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual rights and duties of the LLP and the partners shall be determined by the provisions relating to that matter, as are set out in the **15th Schedule of the CAMA**. The 15th Schedule contains the default LLP agreement.

THE INCORPORATION OF A LIMITED LIABILITY PARTNERSHIP

According to **section 753 of the CAMA**, to incorporate a limited liability partnership, two or more persons carrying on business for profit may subscribe their name to an incorporation document which must be filed with the commission.

The Incorporation document must state;

a) the name of the limited liability partnership

b) the proposed business

c) the address of the registered office

d) name and address of the partners

e) name and address of persons who are to be designated partners

f) other information concerning the proposed limited liability partnership as the commission may prescribe.

According to **section 754 of the CAMA,** the commission shall, within 14 days, register the incorporated documents and give a certificate to that effect, which must be signed by the commission and authenticated by its official seal.

The certificate must state;

a) the name of the limited liability partnership

b) the registration number

c) date of registration

d) that the limited liability partnership has been Incorporated as a limited liability partnership. And

The certificate shall be prima facie evidence that the limited liability partnership is incorporated by the name specified in it.

According to **section 756 of the CAMA,** upon registration, a limited liability partnership may sue and be sued in its name, acquire, own, hold or dispose of property whether movable or immovable, tangible or intangible, may have a common seal and enjoy other benefits of a body corporate.

A partner of the LLP is an agent of the LLP but not of the other partners, unlike a general partnership. According to **section 765 of the CAMA,** a partner of a limited liability partnership is for the purpose of business of the

limited liability partnership an agent of the limited liability partnership but not of other partners.

The LLP, as a result, will be liable for the wrongful acts or omissions of a partner of the LLP done in the course of the business of the LLP or with its authority. The LLP, however, is not bound by anything done by a partner in dealing with a person if the partner in fact has no authority to act for the LLP in doing a particular act, and the person whom the partner is dealing with knows the partner has no authority, or does not know or believe him to be a partner of the LLP. This was provided under **Section 766 of the CAMA.**

Furthermore, an obligation of the limited liability partnership whether arising in contract or otherwise, is solely the obligation of the limited liability partnership, and the Liabilities shall be met out from the property of the limited liability partnership.

Thus, as provided in **Section 767 of the CAMA**, a partner is not liable directly or indirectly for the obligation of the limited liability partnership solely by reason of being a partner of the limited liability partnership. And lastly, a partner shall be personally liable for his own wrongful act or omission and not of other partners.

ON HOLDING OUT AS A PARTNER

According to **Section 768(1) of the CAMA**, a partner who by words spoken or written or by conduct, represents himself or permits himself to be

represented by another as a partner of a limited liability partnership, is liable to any person who on the faith of such representation gives credit to the limited liability partnership, and where the limited liability partnership has received the credit it shall be liable to the extent of the credit received or any financial benefit derived thereon.

Hence, a person who holds themselves out to be a partner of the LLP is liable to any person who, based on the faith of the representation, has given credit to the LLP. Without prejudice to the person holding themselves out, the LLP would be liable to the extent of the credit received by it or any financial benefit derived thereon.

WHEN LIABILITY BECOMES UNLIMITED

According to **section 769(1) of the CAMA,** the liability of partners who acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts and liabilities of the limited liability partnership, and the limited liability partnership shall be so liable to the same extent unless it shows that the fraudulent act was done without its knowledge or Authority.

Also, as was stated in **section 769(2) of the CAMA**, the carrying on of business in such a manner as to defraud is an offense and is punishable with a term of imprisonment which may extend to two years or a fine as the court deems fit or both.

Furthermore, according to **section 769(3) of the CAMA,** the persons who suffered from such fraud are entitled to be compensated personally by the limited liability partnership or the partners or designated partners who committed the act, but the limited liability partnership shall not be liable if any such partner or designated partner acted fraudulently without its knowledge.

Persons who cannot join a limited liability partnership as stated in **S.747**:

1. Persons of unsound mind and found by a court of competent jurisdiction to be so.
2. Undischarged bankrupt

Section 788 of the CAMA provides for a foreign limited liability partnership which intends to carry on business in Nigeria.

According to **Section 757 CAMA,** the words, 'Limited Liability partnership' or the acronym, LLP, is required to be the last word of an LLP name.

GROUNDS UPON WHICH THE COURT MAY WIND UP A LIMITED LIABILITY PARTNERSHIP

By **section 790 of the CAMA,** A limited liability partnership may be wound up by the

Court if—

(a) all the partners decide that the limited liability partnership be so wound up by the Court

(b) for a period of more than six months, the number of partners of the limited liability partnership falls below two

(c) the limited liability partnership is unable to pay its debts

(d) the limited liability partnership has acted against the interests of the sovereignty and integrity of Nigeria or against her security or public order

(e) the limited liability partnership has made a default in filing with the

Commission, the Statement of Account and Solvency or annual return for any 10 consecutive financial years, or

(f) the Court is of the opinion that it is just and equitable that the limited liability partnership be wound up.

DISTINCTION BETWEEN AN LLP AND A COMPANY

1. All partners in an LLP may be involved in the management of the partnership while only the directors and members in the general meeting are involved in managing a company.
2. The company pays tax as a company while in LLP, the individual partners pay tax from the profit they get.

LIMITED PARTNERSHIP

This is one of the two types of partnership that allows for limitation of liability, unlike general partnership where liability of members is unlimited. However, unlike an LLP, an LP is not a corporate entity. The LP merely provides the business a vehicle by which one or more partners can have limited liability, while also consisting of one or more persons having no limitation of liability. Such partners with limited liability are known as limited or sleeping partners.

A limited partner is not involved in the management of the company and his liability is limited to the amount he contributed or agreed to contribute to the company. He also has no power to bind the partnership, although he is entitled to some rights. He is also not responsible for the conduct or acts of the other partners.

Each limited partner, at the time of entering into the partnership, contributes or agrees to contribute a sum or sums as capital or property valued at a stated amount, and has no liability for the debts or obligations of the partnership beyond the amount so contributed or agreed to be contributed.

At least one general partner must be included in a limited partnership. An LP shall not consist of more than 20 persons.

According to **Section 795(1)-(4) of the CAMA**, a limited partnership may be formed subject to the manner provided by the act, it must not consist of more than 20 persons, it shall consist of one or more persons called general partners who shall be liable for all debts and obligations of the firm, and others called limited partners who upon entry shall contribute or agree to contribute to the capital or property of the firm and shall not be liable to

the debts and obligations of the firm beyond the amount so contributed or agreed to be contributed.

According to **section 795(5) of the CAMA**, unless otherwise agreed in writing by the partners, a limited partner shall not during the continuance of the partnership, draw or receive back any part of his contribution and if he does so he shall be liable to the debts and obligations of the firm to the extent he has drawn or received back.

By **section 796(1) of the CAMA,** an individual or body corporate may be a partner in a limited partnership provided the said individual is not a person of unsound mind so found by the court to be of unsound mind or an undischarged bankrupt.

As was provided for in **Section 797 CAMA,** a limited partnership carrying on business must be registered under the CAMA and also comply with all the legal provisions regarding its operation.

If a limited partner dies, it does not bring an end to the partnership, but the death of a general partner brings an end to the partnership. Hence, unlike a general partnership, a limited partnership is not dissolved by the death or bankruptcy of a limited partner, and lunacy of a limited partner is not a ground for the dissolution of the partnership by the court unless the lunatic's share cannot be otherwise ascertained and realized. And where the limited partnership fails to comply with the requirements of registration, the law is that it is reduced to a general partnership and every limited partner shall be a general partner.

According to **Section 796,** a person cannot become a partner in a partnership if he is:

a. Of unsound mind and has been so found by a court in Nigeria or elsewhere.
b. An undischarged bankrupt.

Furthermore, according to **Section 802,** the name of a limited partnership must end with the words, 'limited partnership' or the abbreviation, 'LP'.

SIMILARITIES AND DIFFERENCES BETWEEN A LIMITED PARTNERSHIP AND A LIMITED LIABILITY PARTNERSHIP

SIMILARITIES

1) Both are regulated by the principal legislation in Nigeria related to carrying on business, being the **Companies and allied matters Act, in part C** and **part D** respectively.

2) Both are partnerships and the members therein enjoy the benefits accruable to partners, as they pay only personal income tax as opposed to Company income tax paid by companies, thereby not being subject to the double taxation rule.

3) By the combined reading of **section 797** and **section 754 of the CAMA**, both must be registered under the companies and allied matters Act

4) By the combined reading of **section 795** and **section 748 of the CAMA**, both must have at least two partners.

5) By the combined reading of **section 796(1)** and **sections 747 of the CAMA**, any person or body Corporate may be partners in both types of partnership, except for persons of unsound mind and undischarged bankrupt.

DIFFERENCES

1) While the effect of the registration of a limited liability partnership under **section 756 of the CAMA**, purports its corporate existence, having the power to sue and be sued, to own, acquire and dispose of property, tangible or intangible, real or movable, a limited partnership has no corporate existence

2) While by **section 763(5) of the CAMA**, a person who retires or ceases to be a member of a limited liability partnership is in the absence of an agreement to the contrary, entitled to an amount equal to his contribution to the limited liability partnership. A partner in a limited partnership is not entitled to the same.

3) While the commission of fraud by a limited partnership reduces it to the status of a general partnership, the Commission of fraud by a limited liability partnership does not ipso facto reduce it to a general partnership, but according to **section 769(1) of the CAMA,** the liabilities of its members to the debts and liabilities of the limited liability partnership shall be

unlimited while the limited liability partnership shall be liable to the same extent only where it authorized the act or had knowledge of it.

4) While the maximum for a limited partnership is 20 persons, a limited liability partnership has no limit.

5) While in a limited liability partnership, by **section 749 of the CAMA**, we have designated partners who shall be responsible for anything, act or matter required to be done by the limited liability partnership in compliance with the Act, in a limited partnership, by **section 795 of the CAMA**, we have general partners who are responsible for the day to day activities of the partnership and shall be responsible for the debts and obligations of the limited partnership.

6) While a limited liability partnership may by **section 789 of the CAMA**, be wound up either by a voluntary agreement of the members or by the court, a limited partnership may be wound up by the court on the orders of the general partner.

7) While the liability in a limited liability partnership is limited, the liability in a limited partnership is unlimited except in relation to the limited partners who, by **section 795 of the CAMA**, shall be liable only to the extent which they have contributed or agreed to contribute to the capital and properties of the limited partnership in the event of liquidation.

COMPARING PARTNERSHIPS WITH A COMPANY

1) With the exception of limited liability partnerships, a partnership, unlike a company, generally lacks corporate existence and thus is one and the same with its members. In **Saddler v Whiteman**, the court held that a partnership has no separate existence from its membership, and the partners carry on business as both the agents and principals of each other within the scope of the partnership business.

2) With the exception of limited liability partnership, a partnership has no perpetual succession, nor is it an artificial person in law capable of holding property, suing and being sued in its own name.

3) With the exception of limited liability partnerships, the partner's liability in a general partnership is unlimited, which is unlike a company where the liability of its members could be limited either to the extent of shares left unpaid or the amount they agreed to contribute. In the US case of **Harralson v Campbell,** the court held that the execution of the judgment debt by way of seizure and sequestration of the personal effects of the general partners and the Partnership property was valid and enforceable.

4) Unlike a company, a floating charge cannot be created over a partnership property because it is jointly owned, and cannot accommodate severance between the partners.

MATTHEW ANUSHIEM

Memorandum and articles of association (meaning and nature)

The contractual effects of the memorandum and articles of association

Alteration of articles of association

Doctrine of constructive notice and indoor management rule

MEMORANDUM AND ARTICLES OF ASSOCIATION

The memorandum of association contains the most important provisions setting out the types of activities which the company can carry on. It has been described as the charter of the company's activities.

On the other hand, the articles contain the rules governing the internal management of the company such as the appointment of directors, the secretary, the powers of the board of directors, the right accruing to different classes of shareholders, meetings of the company etc.

The memorandum stipulates the structure of a company. The article stipulates the contractual relationship between members of a company.

According to **Sec 46 CAMA 2020**, the memorandum and articles, when registered, shall have the effect of a deed between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered in so far as they relate to the company, its members, or officers.

According to the court in **Long E v First Bank,** the contract under seal shows that the members and officers have agreed to do the bidding of the company.

The memorandum is of interest to outsiders who may wish to deal with the company as it enables them to access the powers of the company and the business activities which the company is authorised to embark upon.

On the other hand, the articles are on interest mainly to shareholders, the directors and officers of the company.

The court in **Guinness v Land Corporation Island** laid down the distinction between the memorandum and articles of association viz:

“There is an essential difference between the memorandum and the article. The memo contains the fundamental issues upon which alone, the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors and of the outside public as well as of the shareholders. The articles of association are the internal regulations of the company.”

THE MEMORANDUM OF ASSOCIATION

The Memorandum of Association is a document which sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company’s activities and its relations with the outside world.

The court in **Ladejobi v Odutola holding,** held that the memorandum of association is the repository of the company's object and constitution.

According to the court in **Welton v Saffery**, the memorandum is the more fundamental of the two documents, it is the one to which the original parties forming the company will subscribe their names to, and in the event of conflict between it and the articles of association, it must prevail.

The memorandum of association ideally defines and regulates the company's status and powers. It enables shareholders and outsiders who deal with the company to know what business it is permitted to undertake and the limit of such business, what capital the company has and what its relation is with outsiders generally. Its importance cannot be underestimated because it regulates the external affairs of the company.

Thus, persons who intend to deal with the company must look to it in order to discover the name of the company, its registered office, its capital base, objects, status (whether public or private), restrictions on the powers of the company (if any) and the limitation of liability or otherwise of its members.

CONTENTS OF THE MEMORANDUM OF ASSOCIATION (EXPLAINED UNDER UZOKA'S PART)

According to **Section 27 CAMA,** the memorandum of association of every company shall state—

(a) the name of the company ;

(b) that the registered office of the company shall be situated in Nigeria ;

(c) the nature of the business or businesses which the company is authorised to carry on, or, if the company is not formed for the purpose of carrying on business, the nature of the object or objects for which it is established ;

(d) the restriction, if any, on the powers of the company ;

(e) that the company is a private or public company, as the case maybe ; and

(f) that the liability of its members is limited by shares, by guarantee or unlimited, as the case may be.

SHARE CAPITAL

Additionally, if the company has a share capital, the memorandum has to state the amount of the authorised share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount.

Hence, **Section 27(2a)** states that the memorandum of association shall also state the amount of the minimum issued share capital which shall not be less than N100,000 in the case of a private company and N2,000,000, in the case of a public company, with which the company proposes to be registered, and the division thereof into shares of a fixed amount.

Section 27(2b) goes on to state that each subscriber shall write opposite his name, the number of shares he takes. Furthermore, according to **Section 27(3),** a subscriber of the memorandum who holds the whole or any part of the shares subscribed by him in trust for any other person shall disclose that fact and the name of the beneficiary in the memorandum of association.

COMPANY LIMITED BY GUARANTEE

According to **Section 27(4) of CAMA,** the memorandum of association of a company limited by guarantee shall also state that—

(a) the income and property of the company shall be applied solely towards the promotion of its objects, and that no portion thereof shall be paid or transferred directly or indirectly to the members of the company except as permitted by, or under this Act ; and

(b) each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member or within one year after he ceases to be a member for payment of debts and liabilities of the company, and of the costs of winding-up, such amount as may be required not exceeding a specified amount and the total of which shall not be less than N100,000.

SIGNING OF THE MEMORANDUM OF ASSOCIATION

It is an important requirement that the memo of a registered company must be signed by its subscribers in the presence of at least one witness who shall attest his signature. This was provided under **Section 27(5)** which states that the memorandum of association shall be signed by each subscriber in the presence of at least one witness who shall attest the signature.

The memorandum shall also be stamped as a deed. This was provided under **Section 27(6).**

FORM OF A MEMORANDUM

Section 33 CAMA refers to Tables B, C and D of schedule I to the CAMA which contains the model memorandum of a company seeking to be registered. Table B is for a company limited by shares. Table C is for a company limited by guarantee. Table D is for an unlimited liability company.

This model memorandum can however, be amended, modified or added to by individual companies to suit their requirements. However, such amendment or modifications must still ensure that the memorandum is as near to the prescribed forms as circumstances permit.

THE ARTICLES OF ASSOCIATION

The articles of association is one of the two fundamental constitutional documents of a company. It is a rule book regulating the internal management of a company. It defines the rights, duties and powers of the officers of the company and its members. It also contains such matters as the appointment of directors, their powers and removal, the secretary, the voting rights of different classes of shareholders, transfer of shares, payment of dividends and the appointment of auditor amongst others.

According to **section 32 of the CAMA,** a company must have articles of association prescribing its regulations, and unless it is a company to which a model article applies under **section 34**, it must have its articles registered.

Furthermore, the articles of association registered by a company must be;

a) contained in a single document, and

b) divided in paragraphs, numbered consecutively.

According to the court in **Liquidator of Humbold Redwood co ltd v Coasts,** the memorandum of association is the dominant instrument of the company and the articles are subordinate and controlled by it.

The articles are subject to the memorandum and in the event of any conflict between them, the memo shall prevail. This provision applies even if the provision in the memo is one which need not be there by law. This was held in **Ashbury v Watson.**

In the above case, the right of preference shareholders were set out in the memo and the conflicting provisions of the articles on the same matter were held void.

The articles should also not be referred to for the interpretation of the provisions in the memo if the provision is one which, by law, should be in the memo. This was held in **Guinness v Land Corporation of Ireland.**

The court held in the above case that the purposes of which the article needs to be read to explain or supplement the memo do not extend to

explaining or supplementing the memo in respect of a matter which, under the CAMA, must be contained in the memorandum of association.

Furthermore, in **Ashbury v Watson,** the court held that the articles cannot modify or alter the contents of the memorandum except as provided by the Act. It is relevant to note that the articles can still, in appropriate circumstances, shed light to the memorandum.

For instance, in **Re South Durham Brewery Co,** the memorandum of a company was not clear as to the classes of shares to be issued by a company but the articles made clear the doubt by giving the power to the company to issue shares of different classes.

THE INTERPRETATION OF ARTICLES

According to the court in **Holmes v Keys,** the articles of association of the company should be regarded as a business document and should be construed so as to give effect to business efficacy.

In **Towcester Racecourse ltd v Racecourse Association ltd,** it was held that the court will give the words used in the articles of association their ordinary meaning, derived from the context in which they appear.

EFFECT OF THE ARTICLES OF ASSOCIATION

The articles of association creates a contractual relationship amongst the company, its members and officers, and between the members and officers themselves.

According to **Section 46(1) of the CAMA**, the articles and memorandum of association shall have the effect of a deed between the company, its members and officers and between the members and officers themselves whereby they agree to observe and perform its provisions, as altered in so far as it relates to the company, members and officers.

A clear and strong case in relation to the contractual effect of an article is traceable to the decision of the court in **Oakbank oil co v Crum,** where Lord Selborne stated that parties must be taken to have been acquainted and to have understood the terms of the contract in the articles of association and to be bound by the consequences thereof.

Thus, in **Citec International Estate Ltd v Francis and ors**, the company had, in a manner inconsistent with its articles, held board meetings wherein they wrongly removed the 1st -4th respondents, suspended them and withheld their salaries without notice to them as required by the articles. The court held against the company.

But in **UOO Nig ltd v Okafor, clause 8(d)** in the articles of association provided that one Edozie Okafor should be appointed the director for life. After some irregularities on his part, he was removed by the general meeting. In action for reinstatement, the court held that the CAMA under **sections 281 & 288** only recognizes the position of director for life who can still be removed by members at the annual general meeting. As such, his

removal was valid notwithstanding the provisions of the articles of association.

The effect of the contractual relationship created by **section 46 of the CAMA** may be summarized as follows;

1) The memorandum and articles constitute a contract between a company and its members. Accordingly, each member in his capacity as a member is bound by the provision of the articles.

In **Hickman v Kent or Romney marsh sheep breeders association,** clause 49 in the articles of association provided that disputes must first go to the Arbitration panel before litigation. When his sheep was refused registration, Hickman sued but the court held against him as he was bound by the articles to use arbitration first.

2) The company is also bound by the articles, thus members may sue to enforce their rights against the company.

In **Johnson v Lyttle Iron agency,** the articles provided for procedures for the forfeiture of shares, but the company irregularly forfeited the shares of the shareholder, "Mr Johnson". In action, the court held against the company as it failed to comply with the terms stated in the articles for forfeiture of shares.

Also, in **Wood v Odessa Waterworks Co**, the articles provided for payment of dividend by cash, but the majority purported to enable the company by way of resolution to pay dividend by way of debentures issued

to shareholders to the amount of dividend they were entitled to. The court held against the company.

Lastly, in **Pender v Lushington**, the shareholder's right to vote was contained in the articles of association, but the chairman of the company refused his vote, in action it was held that the shareholder was entitled to have his vote recorded.

3) The memorandum and articles also constitute a contract between the Members inter se to observe; thus one member can sue another if that other fails to observe a provision in the memorandum or articles, there is no need to call upon the company to sue.

In **Ibikoya v Peter Ezenwa and anor,** the court held that the articles of association constitute a contract between the members and a member has the right to enforce observance of the terms of the articles by virtue of the contractual effect given to the articles.

In **Rayfield v Hands,** the articles of a private limited company provided that any member intending to transfer his shares to another must inform the directors who shall take the shares at a fair value. The plaintiff informed the director as required by the articles but the latter refused to take up the shares, in action it was held that the directors were bound to take up the shares at a fair value as provided in the articles.

4) In view of the inclusion of officers of the company by **Section 46 of the CAMA**, the current position is that officers can now sue the company

to enforce the rights conferred on them in their capacity as officers by the articles.

It is relevant to note that this was not the position of the law before 1990, as it was a settled law back then that rights conferred on a member in a capacity other than of a member was of no contractual effect.

The case often cited in support of this old rule is the case of **Eley v Positive Life Assurance co,** wherein the articles stated that he shall be the solicitor of the company, and when they ceased to employ him, he sued for breach of contract. However, the court held that his action must fail, as the right was conferred on him in a capacity other than that of a member.

But it must be noted that if the facts in **Eley's case** repeated itself today, the officer would be entitled to his rights, as **Section 46 Of The CAMA** clearly captures the contractual effect which the articles of a company creates in relation to the company and its officers.

However the contractual relationship created under **section 46 of the CAMA** cannot and should not be taken to extend to third parties. This is because as a result of the rules of privity, third parties are excluded from such contractual effect. Thus, a third party cannot sue to enforce any right granted to him by the articles of a company. An example of such third parties that readily comes to mind are promoters who, in law, are treated as out and out outsiders from the company, although this is without prejudice to the fact that a promoter can still be a member of the company when he buys or is offered shares upon incorporation.

Therefore a provision in the articles stating that a company would pay preliminary expenses incurred by the promoters is regarded only as an undertaking to the member. It does not give a right to the promoter to recover from the company. In **Re National Male coach ltd,** it was held that the mere fact that a promoter pays the registration fee and ad valorem stamp duty on the registration of a company does not ipso facto entitle him with the right to recover it from the company.

5) The company is entitled to sue its members for the enforcement, and to restrain the breach by them of its articles, and to treat as irregular, anything which is done in contravention thereof. This was held in **Blackpool v Hampson** and **MacDougal v Gardiner.**

6) The company, directors and officers will be treated as having made a contract in terms of the clause in the articles and are bound accordingly.

7) The directors or officers of a company are bound by the articles and if they act otherwise than in accordance with the provisions of the articles, they may render themselves liable to an action at the instance of the members and if, as a result of the breach of duty, any loss is suffered by the company, the directors are liable to refund to the company any damage so suffered.

8) The contractual relations created by the articles have statutory operation as was held in **Evans v Chapman** and the court cannot rectify them under its equitable jurisdiction even if it is proved that they do not

reflect the intention of the parties as was held in **Scott v Frank F Scott (London) Ltd.**

ALTERATION OF ARTICLES OF ASSOCIATION

Alteration means addition or substraction. The company has the liberty to add or remove from its articles of association and such right is exercisable by a special resolution.

S. 53(1) states that subject to the provisions of the act and to the conditions and other provisions contained in its memorandum, a company may, by special resolution, alter or add to its articles, including deleting or modifying the provisions stated in **S. 27(1)(a-d).** Hence, the articles of a company may be altered or added to by special resolution provided that such alteration does not conflict with the provisions of the Act and of the memorandum of association of the company.

A special resolution can be defined as a resolution or agreement by the company that must secure an overwhelming majority of the votes of each member.

According to **section 258 of the CAMA**, a resolution is an ordinary resolution when it has been passed by a simple majority of votes cast by members of the company who are entitled to do so. Whereas a resolution is a special resolution where it has been passed by at least three fourth of votes cast by members of a company at a general meeting of which 21 days' notice has been issued to that effect.

The use of ‘may’ in **S. 53(1)** means that a company has the discretion to alter or not to alter its articles but it must be by special resolution. Alteration may be by addition, deletion or modification.

To change the character of a company from a private to a public company and vice versa, a process called re-registration must be undergone. It cannot be changed by mere alteration. Same applies to changing the liabilities of its members as **S. 54** stipulates that no alteration can make a member’s liability to a company to be increased.

Where there is a conflict between the memorandum of association and the articles of association, the memorandum will prevail.

RESTRICTIONS ON ALTERATION

The alteration of articles of company is subject to diverse limitations;

1) According to **section 54 of the CAMA,** articles or memorandum of a company cannot be altered, so as to impose a higher liability on the members to;

a) take or subscribe for more shares than he held on the date he became a member

b) increase his liability to contribute to the share capital of the company or

c) pay money by any other means to the company.

2) The articles of a company cannot be altered to include an illegal purpose

3) **Section 53 of the CAMA**, provides that the alteration of the articles is subject to the conditions in the memorandum and the Act, and in the event of respective conflicts, the Act or memorandum as the case may be, shall prevail over the articles.

4) The articles of a company cannot be altered except it is bonafide in the interest of the company as a whole. This was held in **Allen v Gold Reets of West Africa Ltd.** Once this condition is satisfied, it doesn't matter that the alteration had a retrospective effect. And it is for the members of the company to determine whether the alteration was in the interest of the company as a whole. If yes, the court cannot interfere. In **Breen Halgh v Arderne,** the articles of association provided that members could not transfer shares to non-members so long as a member was willing to buy same at a fair value. The majority shareholders, wishing to transfer their shares to non-members, secured the alteration of the articles to allow such transfer. It was held that the alteration was bonafide and it was immaterial that the minority shareholders lost their right of pre-emption (the right to purchase shares before it is offered to the public).

Also, in **Shuttleworth v Cox brothers**, the articles provided that the plaintiff and four others should be first directors and hold the office for life unless disqualified for any one of six specified events.

Owing to irregularities in the plaintiff's account, the articles were amended by a special resolution adding a 7th event namely, a request in writing by all his co-directors that he should resign.

Such request was subsequently made to the plaintiff and the plaintiff sued for breach of contract. It was held that the contract, if any, between the plaintiff and the company in the original articles were only subject to alteration if the alteration was made bonafide for the benefit of the company. The court held that there was no evidence of bad faith and no ground for questioning the deicision of the shareholders that the alteration was for the company's benefit.

5) The court will not give effect to any alteration that is discriminatory or amounts to the expropriation of an individual shareholder's right. In **Brown v British Abrasive will co ltd,** the company was in need of capital and the majority shareholders agreed to provide it if they could buy up the remaining shares of minority shareholders. The articles were then altered to give them power of compulsory purchase. In action, the court held against the alteration.

But in contrast, the court held otherwise in **Sidebottom v Kershaw leese**, where the directors of a company altered the articles to give powers to the directors to expropriate the shares of any shareholder who competed with the company's business. The plaintiff competitor sued that the alteration was invalid but the court held against him, holding that the alteration was bonafide for the benefit of the company as a whole and was hence, valid.

EXCEPTIONS TO THE LIMITATION OF ALTERATION OF ARTICLES

However, while diverse limitations exist against a company in altering its articles, it must be noted that a company is not precluded from altering its articles for the purpose of introducing that which ought to have been in the original articles, provided the alteration shall be bonafide for the interest of the company as a whole. In **Andrews v Gas Meter co,** it was held to be valid where the company on the basis of this rule altered its article so as to authorize the issuing of presence shares ranking in priority over existing shares.

Furthermore, a company cannot be prevented by injunction to exercise the right of altering its articles, because it is a right derived from statute. This right of altering the articles shall be exercised even when same amounts to a breach of contract. At worst, the victim could sue for breach of contract and claim damages.

In **Shirlaw v southern foundries ltd** the plaintiff was employed and appointed as the managing director in the defendant company. The articles of association, however, provided that he should also be part of the board of directors, and was to remain so for a period of 10 years. Later on, another company acquired majority shares in the company, altered the articles and removed Shirlaw as a director before the expiration of 10 years. In action, the court held that since his appointment as the managing director was to subsist for ten years, his consequent removal was wrongful and he was therefore entitled to damages.

SIMILARITIES AND DIFFERENCES BETWEEN THE MEMORANDUM AND ARTICLES OF ASSOCIATION

SIMILARITIES

1. Both are made by the promoters of a company.
2. Both are public documents

DIFFERENCES

MEMORANDUM OF ASSOCIATION	ARTICLES OF ASSOCIATION
It contains and defines the object of a company	It does not contain the objects but contains the internal management rules.
It defines the relationship between the company and outsiders	It defines the relationship between members and organs of a company
It cannot be altered except by the provisions of the CAMA 2020	Being a mere by-law, it can be altered by a special resolution
It is the supreme document of the company	It is subordinate to the memorandum of association

EFFECT OF MEMORANDUM AND ARTICLES OF ASSOCIATION

Subject to the provisions of the CAMA, the memorandum and articles, when registered, shall have the effect of a deed between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered in so far as they relate to the company, its members or officers. This was held in **S. 46(1).**

The effect of this provision is that the articles of association and memorandum constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other. This was held in **Wood v Odessa Waterworks.**

MEMBERSHIP OF A COMPANY

With regard to a company limited by shares, a member is a person who has shares in the company. A person cannot be a member thereof without holding shares in the company and there can be no shareholder without membership except a bearer of shares certificate warrant who is a shareholder but is not a member because his name is not entered in the register of members.

The CAMA provides the definition of a member in **S. 105(1).** The said section states that a subscriber of the memorandum of a company shall be

deemed to have agreed to become a member of the company, and on its registration shall be entered as the member in its register of members.

According to **Section 105(2),** every other person who agrees in writing to become a member of a company, and whose name is entered in its register of members, is a member of the company.

Hence, from these provisions, it can be said that members of a company consists of the subscribers to the memorandum and all other persons who have agreed in writing to become members of the company and whose names are in the register of members.

The members in the general meeting are considered the heart and directing organs of the company.

The determination of members in a company limited by shares is the acquisition of shares. If a shareholder has not perfected his membership of the company by registering his name under the register of companies, he is not yet a member in law but only in equity and can bring an action in mandamus mandating the company to do the required steps if he has done all that is needed to be done on his own part.

CATEGORIES OF MEMBERS

1. **Achieving members**: Such members started their acquiring and shareholding at the beginning and formative stages of the company.

They do not need to get their names added into the register of members because they automatically become members of the company once the company is incorporated. Achieving members are deemed members of a company.

2. **Acquiring members**: These are people that become members after the incorporation of the company. Their names must be added to the register of members to be legally recognised as a member of a company. This was held in **Orji v DTN Nig. Ltd.**

   For these members, they must meet two conditions to become a member of a company:
   a. An agreement in writing to become a member.
   b. Entry of name on the register of members.

These two conditions are cumulative and unless they are both met, the status as a member will not attach.

A memorandum of association is construed contra proferentes i.e. against the makers of the memorandum.

SUBSCRIBERS TO A MEMORANDUM (ACHIEVING MEMBERS)

A subscriber to the memorandum becomes a member on the incorporation of the company. An entry of the subscriber's name on the register of members is not necessary to make him a member of the company. They are deemed to have taken the shares set opposite their names.

As regards subscribers of the memorandum, no allotment is required and no entry on the register of members is necessary in order to constitute membership. This was held in **Alexander v Automatic Telephone Co.** and **Nicol's case.**

FOUR WAYS OF BECOMING A MEMBER OF A COMPANY

1. Subscription: Subscribing to the memo and articles of the company.
2. By making an application under a prospectus or offer for sale or being allotted shares.
3. By taking a transfer from an existing member and being placed in the register of members or
4. Transmission of shares: By inheriting shares of a deceased shareholder and being placed in the register of members..

Transfer of shares is transfer of rights to a shareholding by parties inter vivos.

Transmission of shares is transfer of rights to a shareholding by inheritance. It is done through obtaining probate or letters of administration. Probate is gotten if the deceased died testate while letters of administration are gotten if the deceased died intestate.

WHO MAY BECOME A MEMBER

As a general legal rule, any legal person may become a member of a company unless he is of unsound mind and so found by a court or is an undischarged bankrupt. This is according to **Section 106(1) CAMA.**

As for infants, personal representatives of deceased persons, companies and aliens, they are subject to special rules.

INFANTS

Section 20 CAMA provides that a person under the age of 18 shall not join in the formation of a company or be a subscriber to the memo of association unless there are at least two other subscribers not disqualified under the Act.

Hence, an infant may become a member of a company in which case, the ordinary rules of contract apply. However, he shall not be counted for the purpose of determining the legal minimum of the members of the company. This was held in **Sec 20(2) of CAMA.**

However, it should be noted that a contract entered into by an infant is voidable. He may avoid it before or within a reasonable time before attaining his majority and he cannot recover the price paid unless there is a total failure of consideration.

This was held in **Steinberg v Scallah.** In that case, the plaintiff, while an infant, applied for and was allotted shares in a company. She paid half of the amount on each share. She neither received dividends nor attended any meetings.

18 months after allotment, while still an infant, she repudiated the contract and asked for repayment of her money. It was proved at the trial that the shares were at one time, of substantial value. The court held that the plaintiff could only succeed by showing that there was a total failure of consideration. She failed to do so and therefore, she was not entitled to recover the money.

PERSONAL REPRESENTATIVES OF DECEASED PERSONS

When a member of a company dies, his shares are transmitted to his executors or administrators. They must produce to the company, the grant of probate of the will, or of letters of administration of the estate. According to **Section 173 CAMA,** the production of the probate of the will or letters of administration of the estate of the deceased member is sufficient evidence of the grant.

COMPANIES

According to **Section 381,** a company may take shares and be a member of another company.

However, a company cannot be member of itself. This means that it cannot purchase its own shares for a consideration because such a purchase would amount to a return of capital to the shareholders from whom the shares were bought and would therefore operate as a reduction of capital without the consent of the courts contrary to **Section 107 and 108 of CAMA.**

A company cannot also be a member of its holding company and any allotment and transfer of shares to its subsidiaries is void.

ALIENS

An alien may join in forming a company acquire shares in a company but must comply with the laws relating to alien participation.

RIGHT OF MEMBERSHIP

According to **Section 107 CAMA,** every member shall, notwithstanding any provision in the articles, have a right to attend any general meeting of the company and to speak and vote on any resolution before the meeting.

However, the articles may provide that a member shall not be entitled to attend and vote unless all calls or other sums payable by him in respect of shares in the company have been paid.

Other rights include:

1. Right to dividends when declared.
2. Return of capital on winding up (if there is available surplus).
3. Return of capital on reduction of capital.
4. Voting at meetings
5. Transfer of shares (if not restricted in the articles).
6. Right to sell, mortgage or otherwise dispose of his shares.

CEASING TO BE A MEMBER

A person ceases to be a member of a company upon the happening of the following:

1. By transfer of all his shares or
2. By forfeiture of his shares or by the company accepting a surrender of the shares as a short cut to forfeiture or
3. Where the company sells the shares to enforce a lien or
4. By transmission on his death, lunacy or bankruptcy and registration as a member of the person entitled by transmission or
5. Where the company is wound up or is struck off register of companies or
6. By recessions of his contract to take the shares or
7. By repudiation as by an infant or by the disclaimer as by the trustee in bankruptcy followed by the removal of the bankrupt member from the register or
8. If he holds redeemable shares only, by redemption of the shares. Transfer of shares is an act done inter vivos. Transmission has no discretion. It is automatic by the happening of the stated event.

DOCTRINE OF CONSTRUCTIVE NOTICE

Constructive notice implies that if a document has been registered at the public registry, then the whole world is deemed to take notice and it is their responsibility to take steps with due diligence to find out the contrary.

The court in **Lloyds v Bank** defined constructive notice to mean that notice which a person ought to have known if he acted reasonably and diligently. It is also a notice implied by the operation of law.

DOCTRINE OF CONSTRUCTIVE NOTICE UNDER COMMON LAW

Under the common law, the rule of constructive notice was to the effect that once the memo and articles of association as well as other relevant documents had been registered under the CAC, the whole world was deemed to have notice.

Under common law, the memo and articles of association together with special, ordinary and extra ordinary resolutions filed at the company's registry are public documents which all and sundry are deemed to be aware of.

According to the court in **Griffith v Paget**, the person is regarded not only as having read those documents but also as having understood them according to their proper meaning.

This common law view was laid down in **Royal British Bank v Turqund**.

The rule in **Royal British Bank v Turqund** acts as a protection in favour of the company so that an outsider who contracts with the company will not plead ignorance so as to evade the consequences where it attaches.

In **Re Jon Beauforte London ltd**, the company's object clause provided for the manufacturing of dresses but it was producing veneered panels,

when it became insolvent, the creditor sued, but the court held against him as he ought to have known the company has for long been acting ultravires.

This rule of constructive notice did not, however, deal with minor internal regulations of a company. In the case of **Royal British Bank v Turqund**, the court held that while persons dealing with a company are assumed to read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent there with, they are not expected to do more. They need not inquire into the indoor management and may assume that all is being done regularly. This is in line with the maxim, Omnia presumuntu rite esse acta.

According to the court in **Official Liquidator Manasube & co v C.O.P**, while the lenders to a company ought to acquaint themselves with the articles and Memorandum of that company, they need not embark upon an investigation of the propriety, legality or regularity of the directors' acts.

Thus, in **Royal British Bank v Turquand**, an action was brought for the return of money borrowed by the company. The company argued that it was not required to pay back the money because the manager who negotiated the loan should have been authorized by a resolution of the general meeting to borrow but he had no such authorization. And following from the doctrine of constructive notice the bank was deemed to know this. The Court held that the public documents only revealed that a resolution was required, not whether the resolution had been passed. The bank had no knowledge the resolution had not been passed and thus it did not appear on the face of the public documents that the borrowing was invalid.

STATUTORY INTERVENTION

Due to the hardship caused by the doctrine, the makers of the law enacted an outright abolition of the doctrine of constructive notice which was contained in **S. 92 CAMA.**

According to **section 92 of the CAMA**, except as mentioned in **section 223** regarding particulars of charges in the register, a person is not deemed to have knowledge of the contents of the memorandum or articles of association of a company, or any other particulars or documents or the contents thereof merely because such documents are registered by the commission, or are available for inspection at the office of the company.

The effect thereof is that the doctrine of Constructive notice no longer applies with respect to the memorandum and articles of association and other documents or particulars of the company deposited with the commission. However, the doctrine continues to apply as regards particulars of charges in the register.

PRESUMPTION OF REGULARITY

In order to further abolish the rule of constructive notice, CAMA provided for the presumption of regularity.

Section 93 of the CAMA specifically provides for the presumption of regularity. Thus, a person dealing with a company may make the following presumptions;

a) That the company's memorandum and articles have been duly complied with.

b) That every person described in the particulars filed with the commission such as the directors, managing director, secretary etc have been duly appointed or have power to so act…

c) That the secretary or any officer having the power to issue documents or certified copies of documents on behalf of the company, has authority to warrant its genuineness.

d) That a document has been duly sealed by the company if it bears what purports to be the seal of the company signed by two persons who can be assumed to be the director and secretary of the company.

However, the presumptions will not apply where the person dealing with the company had actual knowledge of the contrary or having regard to his position or relationship with the company, ought to have known the contrary.

This is a rebuttable presumption.

UMENWEKE

Memorandum of association

Doctrine of ultra vires

Articles of association

Object clause of the memorandum of association

Prospectus

Statement in lieu of prospectus

Remedies for misrepresentation

A share is a unit of liability or interest of a company.

FEATURES OF A LIMITED LIABILITY COMPANY

1. The liability of each member of the company is limited to the amount of shares subscribed by the shareholders.
2. Perpetual succession.
3. The company can own land.
4. It can sue and be sued – S. 42 CAMA

CONTENTS OF A MEMORANDUM OF ASSOCIATION

According to **Section 27 CAMA,** the memorandum of association of every company shall state—

(a) the name of the company ;

(b) that the registered office of the company shall be situated in Nigeria ;

(c) the nature of the business or businesses which the company is authorised to carry on, or, if the company is not formed for the purpose of carrying on business, the nature of the object or objects for which it is established ;

(d) the restriction, if any, on the powers of the company ;

(e) that the company is a private or public company, as the case maybe ; and

(f) that the liability of its members is limited by shares, by guarantee or unlimited, as the case may be.

MEMORANDUM OF ASSOCIATION

REGISTRATION OF THE MEMORANDUM OF ASSOCIATION OF A COMPANY (INCORPORATION OF A COMPANY)

According to **Section 41(1) CAMA,** the Commission shall register the memorandum and articles unless in its opinion—

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

(b) the business which the company is to carry on, or the objects for which it is formed, or any of them, are illegal ;

(c) any of the subscribers to the memorandum is incompetent or disqualified in accordance with **section 20 of this Act** ;

(d) there is non-compliance with the requirement of any other law as to registration and incorporation of a company ; or

the proposed name conflicts with or is likely to conflict with an existing company, trade mark or business name registered in Nigeria

According to **Section 41(5),** upon registration of the memorandum and articles, the Commission shall certify under its seal—

(a) that the company is incorporated ;

(b) in the case of—

(i) a limited company, that the liability of the members is limited by shares or by guarantee, or

(ii) an unlimited company, that the liability of the members is unlimited ; and

(c) that the company is a private or public company, as the case may be.

According to **Section 41(6),** the certificate of incorporation shall be prima facie evidence that all the requirements of this Act in respect of registration and matters precedent and incidental to it have been complied with and

that the association is a company authorised to be registered and duly registered under this Act.

The certificate of incorporation is a very vital, crucial and fundamental weapon for the functioning of a company. It is a prima facie evidence that all the requirements of the act in respect of registration and of matters precedent and incidental thereto have been complied with and that the company is a company authorised to be duly registered under the Act.

According to the court in **Lassisi v Registrar of Companies,** a company is an artificial human being and its registration is its birth certificate. The certificate therefore, is not only the company's birth certificate evidencing the fact that it has been created as a legal person, it is also conclusive evidence that the company was rightly born after proper ante-natal procedure had been followed.

EFFECT OF INCORPORATION

S. 42 CAMA states that as from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the powers and performing all functions of an incorporated company including the power to hold land, and having perpetual succession, but with such liability on the part of the members to contribute

to the assets of the company in the event of its being wound up as is mentioned in this Act.

Thus, when a company is registered, it is said to be incorporated. This act of incorporation automatically converts the company into a juristic person recognised by law as having all the powers and functions of an incorporated company. These include the power to acquire and own property, to sue and be sued eo nomine (i.e. in its own name), to have a common seal and perpetual succession. In short, the company becomes a legal abstraction invested with rights, duties and functions and is separate and distinct from shareholders. This was held in **STB Plc v Olusola, NNPC v Lutin Investment Ltd** and **Vibelko Nig. Ltd v NDIC.**

REVOCATION OF A CERTIFICATE OF INCORPORATION

It should be noted that according to **Section 41(7),** the Commission may withdraw, cancel or revoke a certificate of incorporation issued under this Act where it is discovered that the certificate was fraudulently, unlawfully or improperly procured.

Section 41(8) provides that the Commission may cause the publication of the withdrawal, cancellation or revocation of certificates of incorporation periodically in the Federal Government Gazette.

CAPACITY OF AN INDIVIDUAL TO FORM A COMPANY

According to **Section 18(1),** as from the commencement of this Act, any two or more persons may form and incorporate a company by complying with the requirements of this Act in respect of registration of the company.

Section 18(2) states that notwithstanding subsection (1), one person may form and incorporate a private company by complying with the requirements of this Act in respect of private companies.

Section 18(3) states that a company may not be formed or incorporated for an unlawful purpose.

Section 20 provides for the capacity of individuals or corporate bodies to form a company.

Section 20(1) provides that subject to **subsection (2)**, an individual shall not join in the formation of a company under this Act if he is—

(a) less than 18 years of age ;

(b) of unsound mind and has been so found by a court in Nigeria or elsewhere ;

(c) an undischarged bankrupt ; or

(d) disqualified under sections 281 and 283 of this Act from being a director of a company.

Section 20(2) provides that a person shall not be disqualified under subsection (1) (*a*), if two other persons not disqualified under that subsection have subscribed to the memorandum.

Section 20(3) provides for the capacity of a corporate body. It states that a corporate body in liquidation shall not join in the formation of a company under this Act.

DOCUMENTS REQUIRED FOR THE REGISTRATION OF COMPANIES- S.36(4)

1. Memorandum of association
2. Articles of association
3. Notice of registered office address
4. Statement of share capital
5. Whether the company is a public or private company
6. Statement of liability of shareholders
7. Particulars of first directors
8. Particulars of company secretary
9. Any other docs required by law

ALTERATION OF A MEMORANDUM

According to **Section 49(1) of the CAMA,** the conditions contained in the memorandum of association cannot be altered except in the manner, cases and extent provided in the act. The alteration of the memorandum may be

in respect of the name of the company or in respect of the business or object of the company.

MODE OF ALTERATION OF THE MEMORANDUM

In respect of the name of the company, according to **Section 50(1) of the CAMA**, The name of the company shall not be altered except with the consent of the Commission in accordance with section 30.

Section 30(1) of the CAMA purports that where a company is inadvertently registered under a name identical with an existing company or so nearly resembling it as to be likely to deceive, it may, with the approval of the Commission, change its name within six weeks.

In the same vein, **section 30(3) of the CAMA**, purports that a company may by special resolution and with the approval of the Commission signified in writing, change its name with the written approval of the Commission, but no approval is required where all that is intended is to substitute "Public Limited Company" for "Limited" or vice versa or on a conversion from a public to a private company or vice versa.

Lastly, where a company changes its name, the commission shall enter the new name in the register and shall issue a certificate of incorporation altered to meet the circumstances of the case.

In respect of the business or object clause, **section 50(2) of the CAMA** provides that the business of the company or its object may be altered and added to in accordance with **section 51**.

Section 51(1) of the CAMA provides that the business or object of a company may be altered by a special resolution at a meeting after notice in writing has been duly issued to all members. However, where an application is made to the court for the cancellation of the alteration, it shall not have effect, except in so far as it is confirmed by the court.

Section 51(2) of the CAMA provides that holders of not less than fifteen percent in nominal value of the company's issued share capital or holders of debentures can make an application for cancellation of the resolution to the Federal High Court within twenty-eight days of the passing of the resolution.

However, if the company is not limited by shares, holders of not less than fifteen percent of the company's members or holders of not less than fifteen percent of the company's debentures can object to alterations of the company's objects. And any member who voted in favour or consented to the resolution cannot apply for cancellation.

Section 51(3) Of The CAMA provides that an application under this section shall be made not later than 28 days after the date on which the resolution altering the company’s business or objects was passed, and may be made on behalf of the persons entitled to make the application by such one or more of them as they may appoint in writing for that purpose.

According to **Section 51(4) Of The CAMA,** on an application made under **Section 51,** the Court may make an order confirming the alteration either wholly or in part and on such terms and conditions as it deems fit, and may adjourn the proceedings in order that an arrangement may be made to the

satisfaction of the Court for the purchase of the interest of dissenting members, and the Court may give such directions and make such orders as it considers expedient for facilitating or carrying into effect any such arrangement, but that no part of the capital of the company shall be expended in any case.

Debenture holders in the company have the right to object to alterations in a company's memorandum of association. However, the debentures entitling the holders to object to alterations of a company's business or objects shall be any debenture secured by a floating charge. This was provided under **Section 51(5) CAMA.**

It should be noted that the special resolution altering a company's business or objects requires the same notice to the holders of such debentures as to members of the company, and in default of any provision regulating the giving of notice to any debenture holder, the provisions of the company's articles regulating the giving of notice to members shall apply. This was provided in **Section 51(6) CAMA.**

Section 51(7a) Of The CAMA provides that upon the passing of a resolution to alter the objects or business of a company, and an application is thereafter made to the court for its confirmation, the company shall, in respect of the application, give notice to the commission, and shall deliver to the commission within 15 days from the date of its making;

(i) a certified true copy of the order, in the case of refusal to confirm the resolution, and

(ii) a certified true copy of the order, in the case of confirmation of the resolution together with a printed copy of the memorandum as altered

Section 51(7b) Of The CAMA provides that where a resolution is passed an no application is made for confirmation by the court, the company shall, within 15 days from the end of the period for making such application, deliver to the commission a copy of the resolution as passed.

Section 51(8) of the CAMA provides that where the Commission is satisfied, a printed copy of the memorandum as altered by the resolution shall be delivered to it, and if it is not satisfied, it shall give notice in writing to that effect to the company and an appeal from its decision shall thereafter, lie to the Court at the suit of any person aggrieved and such appeal shall be made within 21 days after the company had received the notice of rejection from the Commission or within such extended time as the Court may allow.

Therefore, the memorandum as regards the business or object clause of a company may be altered at a meeting by a special resolution. Members or debenture holders as the case may be, may apply for the alteration to be canceled. Even after the resolution has been successfully passed for its alteration, if an application is made to the court for the alteration to be cancelled, same shall have no effect until confirmed by the court. The company shall also give notice of same to the commission whether it was confirmed or not, and if confirmed by the court, the commission may still refuse and an appeal may lie to the court against the decision of the commission.

Section 51(11) provides that the validity of an alteration of the provision of a company's memorandum with respect to the business or objects of the company shall not be questioned on the ground that it was not authorised by subsection (1) except in proceedings taken for that purpose before the expiration of 21 days after the date of the resolution in that behalf. And where such proceedings are taken otherwise than under this section, **subsections (6), (7), (8) and (9)** of this section shall apply in relation thereto as if they had been taken under this section, and as if any order declaring the alteration invalid were an order cancelling it and as if any order dismissing the proceedings were an order confirming the alteration.

S. 52 states that subject to the provisions of **Section 49,** any provision in a company's memorandum, which might lawfully have been in articles of association instead of in the memorandum, may be altered by the company by special resolution, but if an application is made to the court for the alteration to be cancelled, the alteration does not have effect except in so far as it is confirmed by the Court.

Section 52(2) states that the above section does not apply where the memorandum itself provides for or prohibits the alteration of all or any of the said provisions, and shall not authorise any variation or abrogation of the special rights of any class of members.

S. 46 states that subject to the provisions of this Act, the memorandum and articles, when registered, shall have the effect of a deed between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the

provisions of the memorandum and articles, as altered in so far as they relate to the company, its members, or officers.

The subscriber to a company is the first or original shareholder who appends his name as a member of the company.

PROSPECTUS- S. 315

According to **section 315 of the investment and securities Act,** a prospectus is any written or electronic information, notice, advertisement, or other forms of invitation offering to the public for subscription or purchase, any shares, debentures, or other approved and recognised securities of a company and other issues or scheme. In essence, the issuing of prospectus is the means by which companies invite the public to subscribe for shares, debentures and other recognised securities of the company. The prospectus is like a document in a written or electronic form, stating all necessary information concerning the company vis-a-vis the security to be purchased.

It should be noted that only a public company or a statutory body can issue a prospectus. This was stated in **Section 67(1) ISA** which provides that no person shall make any invitation to the public to acquire or dispose of any securities of a body corporate or to deposit money with anybody corporate for a fixed period or payable at call, whether bearing or not bearing interest unless the body corporate concerned is-

(a) a public company, whether quoted or unquoted, and the provisions of sections 73 to 87 of this Act are duly complied with; or

(b) a statutory body or bank established by or pursuant to an Act of the National Assembly and is empowered to accept deposits and savings from the public or issue its own securities (as defined under this Act), promissory notes, bills of exchange and other instruments:

FORMS OF PROSPECTUS

These are documents which are not prospectus properly so called, but serve as and can be accepted as prospectus. They are:

1. Abridged prospectus
2. Deemed prospectus
3. Statement in lieu of prospectus

ABRIDGED PROSPECTUS

An abridged prospectus is a summarized version of a prospectus containing the key requirements of a prospectus. It is usually used now because the full version of prospectus contains many documents and is bulky.

According to **Rule 289 Securities and exchange commission rules**, an abridged prospectus filed as part of a registration statements in accordance with this rule shall be deemed to be a prospectus for the purpose of the Act,

if it meets the requirements of the Commission under this rule; Provided that at the time the registration statement is filed, an application has been made to a recognized securities exchange for the securities to be listed;

(2) Where it is not intended to list the securities on a recognized securities exchange, an application shall be made to the Commission for approval to use a statement in lieu of prospectus for the offering in compliance with the Fourth Schedule to the Act and the rules and regulations of the Commission.

CONTENTS OF AN ABRIDGED PROSPECTUS

According to **Rule 290(1) securities and exchange commission**, an abridged prospectus shall contain information, the substance of which is contained in the prospectus and or registration statement and shall also contain the following statements and information;

“A copy of this abridged prospectus with the documents specified herein has been registered by the Securities and Exchange Commission (S.E.C.).”

This abridged prospectus issued under the provisions of the Act, contains particulars in compliance with the requirements of the Commission and the listing requirements of the relevant exchange for the purpose of giving information to the public with regard to the shares of the company.

The directors of the company collectively and individually accept full responsibility for the accuracy of the information given and confirm having made all reasonable enquiries, that to the best of their knowledge and

belief, there are no facts, the omission of which would make any statement herein misleading or untrue";

(a) the dates of opening and closing of the offer;

(b) indebtedness of the company;

(c) history and business of the company;

(d) parties to the issue of shares;

(e) purpose of the offer;

(f) summary of financial information;

(g) claims and litigations.

(h) material contracts;

(i) procedure for application and allotment;

(j) collecting agents and receiving banker;

(k) application form;

(l) any other information required by the Commission from time to time.

According to **Rule 289(2) securities and exchange commission Rules**, all information contained in an abridged prospectus may be expressed in such condensed or summarized form as may be appropriate in the light of the circumstances under which it is to be used.

DEEMED PROSPECTUS

This means any document, though not titled prospectus, which, for all intents and purposes, contains the basic requirements of a prospectus, used in an offer for sale to the public of companies' securities. Such documents are deemed to be a prospectus issued by the company and must comply with all the prescriptions for a prospectus.

STATEMENT IN LIEU OF PROSPECTUS

This is a statement delivered to the commission in lieu of a prospectus in certain circumstances where the public company has not issued a prospectus or it has issued a prospectus but has not allotted the shares.

This is a statement delivered to the Commission in place of a prospectus in certain circumstances;

a) Where a public company that intends to allot shares to the public has not issued a prospectus, or

b) It has issued a prospectus but has not allotted the shares.

Where a statement in lieu of prospectus is issued, the company shall at least 3 days before the first allotment of the shares deliver to SEC for registration, the statement in lieu of prospectus signed by every person who is named in it as a director or a proposed director of the company or by his agent authorized in writing. Statement in lieu of prospectus shall be

in the form and contain the particulars set out in **part 1 of the 4th schedule to the Investments and Securities Act.**

INVITATION TO THE PUBLIC TO BE ACCOMPANIED WITH PROSPECTUS

According to **section 71 of the investment and securities Act (ISA)**, it is unlawful to issue any form of application for securities in a public company which is offered to the public, unless the form is issued with a prospectus, and such prospectus must be approved and registered by the Securities and exchange commission. According to **Bhadmus**, to come within the meaning of a prospectus, the invitation must be to the public and it must be for subscription or purchase of securities.

Securities means tradable financial assets such as shares. And subscription or purchase has been held in **Government stock and other securities investment co ltd v Christopher**, to mean taking or agreeing to take shares for cash.

Pursuant to **section 69(1) of the investment and securities Act (ISA),** an invitation shall be deemed to be invitation to the public if it is an offer or invitation to make an offer which is;

(a) published, advertised or disseminated by newspaper, broadcasting, cinematograph or any other means whatsoever;

(b) made to or circulated among any persons whether selected as members or as debenture holders of the company concerned or as clients of the persons making or circulating the invitation or in any other manner;

(c) made to anyone or more persons upon the terms that the person or persons to whom it is made may renounce or assign the benefit of the offer or invitation or any of the securities to be obtained under it in favour of any other person or persons;

(d) made to any one or more persons to acquire any securities dealt in by a securities exchange or capital trade point or in respect of which the invitation states that an application has been or shall be made for permission to deal in those securities on a securities exchange or capital trade point.

It therefore follows that an offer made to the shareholders of two companies who are alone entitled to accept it and cannot renounce it in favour of another, is not an invitation to the public. Although where they could renounce in favour of another it would be treated as an invitation to the public.

Furthermore, in **Sherwell v C.I.M.S**, it was held that an offer by a promoter of a company to his friends and relations cannot be treated as an invitation to the public.

But in **Re South of England natural Gas co,** the distribution of thousands of copies of a prospectus for the members of certain gas companies was held to be an offer to the public.

MANDATORY CONTENTS OF A PROSPECTUS

According to **Section 73(1) ISA**, subject to the provisions of section 76 of this Act, every prospectus issued by or on behalf of a company, or by or on

behalf of any person who is or has been engaged or interested in the formation of the company, shall state the matters specified in part I of the third Schedule to this Bill and set out the reports specified in part II of that Schedule and parts I and II shall have effect subject to the provisions contained in that Schedule.

The third schedule to the ISA provides that the prospectus shall state, amongst others:

(a) the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company;

(b) the number of shares (if any) fixed by the company's articles as the qualification of a director, and any provision in the articles as to the remuneration of directors; and

(c) the names, descriptions and addresses of the directors or proposed directors.

2 Where shares are offered to the public for subscription, the prospectus shall give particulars as to-

(a) the minimum amount which in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums (or, if any part of them is to be defrayed in any other manner, the balance of the sums) required to be provided in respect of each of the following-

(i) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue,

(ii) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring subscriptions for, any shares in the company,

(iii) the repayment of any money borrowed by the company in respect of any of the foregoing matters,

(iv) working capital; and

(b) the amounts to be provided in respect of the matters above mentioned otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.

Details Relating to the Offer

3 (1) The prospectus shall state:-

(a) the time of the opening of the subscription lists; and

(b) the amount payable on application and allotment on each (including the amount, if any, payable by way of premium).

(2) In the case of second or subsequent offer of shares, there shall also be stated the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted and the amount (if any) paid on the shares so allotted, including the amount (if any) paid by way of premium.

4 (1) There shall be stated the number, description and amount of any shares or debentures of the company which any person has, or is entitled to be given an option to subscribe for.

(2) The following particulars of the option shall be given-

(a) the period during which it is exercisable;

(b) the price to be paid for shares or debentures subscribed for under it;

(c) the consideration (if any) given or to be given for it or the right to it;

(d) the names and addresses of the persons to whom it or the right to it, was given or, if given to existing shareholders or debenture holders as such the relevant shares or debentures.

(3) References in this paragraph to subscribing for shares or debentures include acquiring them from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale.

5 The prospectus shall state the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash; and-

(a) in the latter case the extent to which they are so paid up; and

(b) in either case the consideration for which those shares or debenture have been issued or are proposed or intended to be issued.

MORE CONTENTS OF A PROSPECTUS

According to **rule 288 securities and exchange commission rules,** every prospectus shall contain the information required by the Third schedule to the Act, and shall in addition state the following information as applicable to the relevant securities.

a) the front cover shall state the name of the issuer, the issuing house(s), their respective Corporate Affairs Commission registration certificate (R.C.) numbers, the type of offer, amount/number of shares being offered, the price and amount payable in full on application;

(b) a detailed table of contents showing the subject matter of the various sections or subsections of the Prospectus and the page number on which each such section or subsection begins;

c) a summary of the offer

(d) the offer stating the times of opening and closing of the offer, the share capital of the company showing the authorized share capital, issued and fully paid share capital and the indebtedness of the company, including details of any bridging loan if any;

(e) names and addresses of the directors and the other parties to the issue;

(f) the Chairman's letter/statement which should disclose the history and business of the company, directors, management and staff, purpose of the offer, financial summary, prospect and future developments of the company, and any other material information;

(g) five (5) year audited historical financial information of the company

(h) letter from the reporting accountants reviewing the audited accounts for the period.

(i) rating report (for debt issue);

(j) statutory and general information stating date of incorporation, registration number and share capital history of the company etc.

(k) procedure for application and allotment;

(l)collecting agents;

(m)the receiving bank;

(n) application form;

(o) a revised forecast in the event of oversubscription and absorption of 15% of the offer shall be disclosed in the offer document.

(p) any other information required by the Commission from time to time.

(2) Caveat on risk factor

The Prospectus shall contain in the front or inside cover page the following statement to be highlighted in bold letters “Investing in this offer involves risks. For information concerning certain risk factors which should be considered by prospective investors, see “risk factors” commencing on the relevant page hereof.

3) Risk factors. Risk factors peculiar to the issuer shall be stated prospectus including the following risks:

a) Risk associated with the business activities of the entity e-g market risk, interest risk, credit risk, exchange risk, etc;

b) risks associated with the sector eg. energy sector risk;

c) political risks, i.e risks associated with the political climate,

d) currency risk; and

e) environmental risk

Measures, if any, taken to address or mitigate the identified risk factors shall be stated.

4) Definitions and corporate directory The Prospectus shall contain:-

a) a glossary of abbreviations and technical terms

b) addresses and telephone numbers of the issuers 'branch/regional office, head/management office, e-mail, website and registrar's office; names of all exchanges where the company's shares are listed or are to be listed.

5) Description of group structure

Where the issuer is a group, the issuer shall disclose, in the summary page of the prospectus, information about the group including a description of group structure and a diagrammatic illustration.

6) Information on the company;

The prospectus shall disclose the following information about the company:

a) availability of raw materials, i.e. where the company derives or will derive its raw materials from;

b) quality control procedures or quality management programme in place.

8) Information on shareholders/directors/key management staff, The Prospectus shall provide a statement as to whether or not any shareholder, director or key management personnel and, where applicable, its key technical personnel, are or have been involved in any of the following (whether in or outside Nigeria):

a) a petition under any bankruptcy or insolvency laws filed (and not struck-out) against such person or any partnership in which he was a partner or any company of which he was a. director or key personnel; or

b) a conviction in a criminal proceeding or is named subject of pending criminal proceedings relating to fraud or dishonesty;" or

c) the subject of any order, judgment or ruling of any court of competent jurisdiction or regulatory body relating to fraud or dishonesty, restraining him from acting as an investment adviser, dealer in securities, director or

employee of a financial institution and engaging in any type of business practice or activity.

Other contents of a prospectus under **sub Rule 15 to sub Rule 22 of Rule 288 of the security and exchange commission rules** includes; Property schedule land and buildings, financial and nonfinancial disclosure requirements, confirmation of the going concern status, corporate governance compliance, pledge of assets, capacity utilization, research and development, and disclosure of developments or events occurring after submission of prospectus but before closing the offer.

REGISTRATION OF PROSPECTUS

The Prospectus must be registered with the Securities and exchange commission before publication". The Securities and Exchange Commission shall not register a prospectus unless it is satisfied that.

a) It is signed and dated in accordance with the legal requirements.

b) It has endorsed on it or attached to it any specified documents.

c) The prospectus complies with the legal requirements of investment and securities Act.

REFUSAL OF THE SECURITIES AND EXCHANGE COMMISSION TO REGISTER A PROSPECTUS

Where the SEC refuses to register a prospectus on the ground that it fails to comply with the requirements of investment and securities Act, an aggrieved person may appeal to the Investments and Securities Tribunal within 21 days of the notification of the refusal by Securities and exchange commission.

SANCTIONS FOR MISLEADING INFORMATION

Omissions or misstatements in prospectus or non-compliance with statutory provisions, may attract criminal or civil liability. The basis of the liability can be punitive, deterrence, or compensatory with the ultimate aim of ensuring transparency and equity in the market for company securities.

CIVIL LIABILITY

When the directors pull a fluke over the eyes of the investors in the prospectus, they will be held liable.

According to **section 85(1) of the ISA,** where a prospectus invites persons to subscribe for shares in a company, all who subscribe for shares or debentures are entitled to compensation for the loss or damage they may have sustained by reason of any untrue statement or misstatement included in it.

Persons liable to pay compensation according to **85(2) ISA** include:

a) any director of the company at the time of the issue of the prospectus;

b) any person who consented to be named and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time;

c) any employee of the company who participated in or facilitated the production of the prospectus; and

d) the issuing house and its principal officers.

In **Edgington v Fitzmaurice**, the plaintiff was fraudulently induced to lend money to a company in order to pay off its outstanding debts, thinking it was actually intended for the expansion and development of the company's trade. In action, the court held the company liable.

But in **Derek v Peek**, the defendant company had alleged in their prospectus that they had authority to run tramways by horsepower or if consent was obtained from the board of trade as already expected, with steam power. Relying on this, the plaintiff bought shares from the company and when consequently the board refused consent, the company was wound up, and the company was sued for deceit and fraud. The court held that the company directors were not fraudulent but honestly believed the statement to be true at the material time.

However, according to **Section 85(3) ISA,** where the consent of an expert is required for the issue of a prospectus and he has given that consent, he shall not, by reason only of his having given the consent, be liable under this section as a person who has authorised the issue of prospectus except

in respect of an untrue statement or mis-statement purported to be made by him as an expert.

Furthermore, according to **section 85(4) of the investment and securities Act (ISA)**, certain persons listed under **section 85(2)** of the Act are relieved from civil liability if they can prove that:

a) having consented to become a director of the company, he withdrew his consent in writing before the issue of the prospectus, and that it was issued without his authority or consent;

b) the prospectus was issued without his knowledge or consent, and that on being aware of its issue, he immediately gave reasonable public notice that it was issued without his knowledge or consent;

c) after the issue of the prospectus and before allotment, he, on becoming aware of any untrue statement or misstatement in it, withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason of his withdrawal, or

d) as regards every untrue statement or misstatement:

i) purporting to be made on the authority of an expert or of an official public document or statement, he had reasonable ground to believe and did up to the time of the allotment of the shares, as the case may be, believe that the statement was true;

ii) purporting to be statement by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of or extract from the report of valuation and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe that the person making the statement was competent to make it and that person had given the consent required by **section 77 of the investment and securities act**, to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration; and

iii) purporting to be a statement made by an official person or contained in what purports to be a copy of or an extract from an official public document, it was a correct and fair representation of the statement or copy of or an extract from the document.

CRIMINAL LIABILITY

Criminal liability may result for non-compliance with statutory provisions and for misstatements of a specific character.

Under **section 71(4) of the investment and securities Act**, issuance of a form of application for securities unaccompanied by full prospectus is an offense punishable on conviction with a fine of N100, 000.00

According to **Section 86(1) ISA,** where a prospectus includes any untrue statement or mis-statement, any director or officer who authorised the issue of the prospectus commits an offence and is liable-

(a) on conviction to a fine of not less than 1,000,000,000 or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment; or

(b) on summary conviction, to a fine of not less than 1,000,000,000 or to imprisonment for a term not exceeding three months or to both such fine and imprisonment, unless he proves either that the untrue statement or mis-statement was immaterial or that he had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe that the statement was true.

According to **Section 87 ISA,** where a statement in lieu of prospectus includes any untrue statement or misstatement, any person who authorised the delivery of the statement in lieu of prospectus for registration commits an offence and is liable-

(a) on conviction to a fine of not less than N1,000,000,000 or to imprisonment for a term not exceeding three years or to both such fine and imprisonment; or

(b) on summary conviction, to a fine not exceeding N1,000,000,000 or to imprisonment for a term not exceeding three months or to both such fine and imprisonment, unless he proves either that the untrue statement or mis-statement was immaterial or that he had reasonable ground to believe and did, up to the time of the delivery for registration of the statement in lieu of prospectus, believe that the untrue statement or mis-statement was true.

It should be noted that, as was provided under **Section 77 ISA,** a prospectus inviting persons to subscribe for securities in a company and including a statement purporting to be made by an expert shall not be issued unless-

(a) the expert has given and has not, before delivery of a copy of the prospectus for registration, withdrawn his written consent to the issue of the statement included in the form and context in which it is; and

(b) a statement appears in the prospectus that the expert has given and has not withdrawn his consent.

According to **77(2) ISA**, if any prospectus is issued in contravention of this section, the company and every person who is knowingly a party to the issue commits an offence and is liable on conviction to a fine of 100,000 naira or a term of imprisonment of not less than three years or to both such fine and imprisonment.

Section 77(2) of the investment and securities Act, makes it unlawful to issue a prospectus containing the statement of an expert unless he has given his consent and has not, before the delivery of the prospectus for registration, withdrawn it and the prospectus itself says so. The company and every person who is knowingly a party to its issue are liable on conviction to a fine of N100, 000.00 or a term of imprisonment of not less than three years or to both such fine and imprisonment.

Section 80(6) of the investment and securities act, criminalizes breach of the registration provisions. If a person issues a prospectus without delivering a copy to the Commission for registration or without attaching or endorsing on it the required reports and documents, the company and every person who is knowingly a party to the issue of the prospectus, shall be jointly and severally liable to a penalty of not less than N25, 000.00 in the case of a company, and not less than N5, 000.00 in the case of other persons for every day from the date of issue of the prospectus until a copy of it is so delivered with the required documents endorsed on it or attached to it.

EXEMPTION OF EXPERTS FROM LIABILITIES

Experts are exempted from civil and criminal liabilities for misstatements not attributable to the experts in the course of packaging the prospectus.

The effect of **sections 85(3) of investment and securities Act,** together with **section 86(2) of the investment and securities act**, shows that

experts who merely consent for the purpose of registering the prospectus is not deemed to have authorized the publication of the prospectus, and as such are exempted from compensatory liabilities, except in respect of an untrue statement or misstatement made by them as experts.

According to **Section 85(3) ISA,** where the consent of an expert is required for the issue of a prospectus and he has given that consent, he shall not, by reason only of his having given the consent, be liable under this section as a person who has authorised the issue of prospectus except in respect of an untrue statement or mis-statement purported to be made by him as an expert.

PROCEDURAL STEPS FOR THE ISSUANCE AND PUBLICATION OF PROSPECTUS

1. Prepare a draft prospectus and submit to an issuing house, which in turn will submit the same to the Nigerian Stock Exchange. If it is an initial public offer, obtain the approval of the Draft Prospectus from NSE. Where it is an already listed company, obtain a Certificate of Exemption from the Nigerian stock exchange.

2. Thereafter, the issuing house will submit the approved draft prospectus together with the Application for Registration of the securities to the securities exchange commission who will comment on the Draft Prospectus and return it to the Issuing House for the necessary inputs.

3. Obtain the consent of Experts (such as accountants and solicitors) who made reports or statements in the prospectus.

4. Print the final copy of the prospectus as approved by SEC, and have it signed by every person named in it as a director.

5. Submit the printed Prospectus to SEC for registration.

6. Send the approved and registered prospectus to the Nigerian stock exchange and the corporate affairs commission for record purposes.

7. Publish the prospectus inviting the public to invest in the securities of the company.