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All Correspondence should be directed to:

The Editor-in-Chief,
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ULTRA VIRES DOCTRINE IS DEAD

BY

KUNLE AINA

SENIOR LECTURER,

FACULTY OF LAW UNIVERSITY OF IBADAN

The Law Reform Commission in Nigeria recommended that provision be made in the Companies and Allied Matter Act 1990 for ultra vires doctrine, which hitherto had been strictly a Common Law issue. *ultra vires* is a Latin expression used to describe acts undertaken beyond the legal powers of those who have purported to undertake them[1] *ultra vires* is only relevant to incorporated bodies, as unincorporated bodies or partnerships have all powers of any individual. The law allows companies to limit or define the extent of powers exercisable by its Memorandum and Articles of Association, whenever the agents exceeds the powers granted to them such acts in excess of power is regarded as *ultra vires*, but the issue does not stop there. Such acts though *ultra vires* the agent may in fact be *ultra vires* the company. That is the company may ratify such acts of its agents to make them the acts of the company. However, where the agents of the company goes beyond the limits permitted in the memorandum of association the company is not competent to ratify such acts and they are regarded as *ultra vires*. The *ultra vires* doctrine would render the whole act a nullity and of no effect. The doctrine inflicted severe hardships on individuals and corporate organization transaction business with limited liability companies. Therefore, as far back as 1945, the Cohen Committee[2] in England recommended the abolition of the doctrine, which we still find in some form in our statue today. This article examines the origin of the *ultra vires* doctrine and its development as well as analyses its present status in Anglo- Nigerian jurisprudence.

THE ORIGIN OF ULTRA-VIRES DOCTRINE

The origin of the doctrine of ultra vires could be traced to the joint Stock Companies Act of 1844 which, in its Section 7, provided

[1] Paul L. Davis, Grower's Principles of Modern Company Law, 6th ed. (London: Sweet and Maxwell, 1997), p. 202.

[2] Report of the committee on Company Law Amendment June 1945, Cmmd. 6659, Pg. 9-10

that the company Deed of Settlement must contain "the business or purpose of the company" and added in Section 25 that;

> On complete registration such company and the then shareholders, therein and all the succeeding shareholders whilst shareholders, shall be and are hereby incorporated... for the purpose of carrying on the trade or business for which the company was formed...

There was no provision on alteration of the Deed of Settlement. so it was generally agreed that the business or purpose of the company could be altered or enlarged by the unanimous consent of the shareholders, and that they could also ratify *ultra vires* acts of the directors. It was held in *Spackman v Evans*[3] that an act of the director, though not warranted by the Deed of Settlement, would be valid if it was either previously authorized or subsequently ratified by all the shareholders.[4] Essentially the restriction on the company from engaging in acts that were *ultra vires* the Deed of Settlement was for the protection of the shareholders who at this time did not enjoy the limited liability status. However, it was always within the powers of the shareholders to extend the powers of the directors and the objects of the company or to ratify acts of the directors in excess of the powers granted the directors.

The Limited Liability Act of 1855 and the subsequent Joint Stock Companies Act of 1856 were silent on the issue of alteration of the objects clause, though the latter Act replaced the deed of settlement with the memorandum and articles of association. It could be assumed that the objects of the company could be amended by unanimous consent of all shareholders.

The Companies Act, which came into force in 1862, made provisions for memorandum of association, which must state the objects of the company [5] and increase of share capital. In section 12 the Act [6] provided:

> "Save as aforesaid and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association"

[3] (1968) L.R. 3 H.L.171
[4] *Ibid.* P.190
[5] *S. 8 Companies Act 1862*
[6] *Companies Act 1862*

This is the basis and origin of *ultra vires* doctrine as the total prohibition of alteration of the objects clause even by unanimous decision of the shareholders will render acts in excess of the memorandum of association beyond the powers of the company. *In the words of the Lord Cairns L.C. in the leading case of Ashbury Railway Carriage and Iron Co. Ltd, v Riche*[7] "

> It is not merely that every member will observe the conditions upon which the company is established, but that no change shall be made in those conditions, and if there is a covenant that no change shall be made in the objects for which the company is established, I apprehend that this includes within it the engagement that no object shall be pursued by the company or attempted to be attained by the company in practice, except an object which is mentioned in the memorandum of association".

In that 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, fittings, machinery and rolling sticks, to carry on the business of mechanical engineers, and general contractors to purchase, issue, work and sell mines, minerals, and to buy and sell any such materials on commission or as agents." The directors of the company entered into a contract to finance the construction of a railway in Belgium. Subsequently, the company repudiated the contract on the ground that was *ultra vires*. The question was whether this contact was valid and if not, whether or not it would be ratified by the shareholders. The English House of Lords head[8] that the contract was *ultra vires*, the company. The court put beyond doubt the inability of the shareholders to extend by unanimous consent the memorandum of association and the effect of an *ultra vires* action in the following words:

> *If it was a contract void at its beginning it was void because the company had been in a room and every shareholder of the company had said "That is a contract which we sanction by placing the seal of the company" the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent have been*

[7](1875) 7 H.L. 653 at 670
[8]Ibid.

attempting to do the very thing which, by the Act of parliament they were prohibited from doing[9]

THE RULE, ITS BASIS AND AMBIT

The House of Lords in England finally laid down the *ultra vires* doctrine in the case of Ashbury Railway Carriage and Iron Company Ltd v. Riche"[10], which was in interpretation of the Companies Act. The Law Lords gave as a reason for the law that the rule is necessary as the object clause of a companies memorandum is to enable subscribers to the company to know the uses to which their money might be put and to enable persons dealing with the company to know the activities permitted the company. In short, the *ultra vires* doctrine is necessary for the protection of the company's investors and creditors. In the words of Lord Cairns,

> The provisions under which that system of limiting liability was inaugurated were provisions not merely perhaps. I might say not mainly for the benefit of the shareholders for the time being in the company but were enactments intended also to provide for the interests of two other very important bodies. In the first place those who might become shareholders in succession to the person who were shareholders for the time being and secondly the outside public and more particularly those who might be creditors of companies of this kind [11]

Lord Parker agreed when he said;

> *In the first place, it gives protection to subscribers, in the second place, it gives protection to persons who deal with the company and who can infer from the companies object the extent of the company's power*[12]

The *ultra vires* doctrine was later applied by the courts erroneously to activities that are prohibited by law. In fact the courts have used the rule to explain the prohibition of reduction of capital, or payment of dividends out of capital. For instance Lord Macnaghten remarked in the case of *Trevor v. Whitworth*[13] *that,*

[9] Coirns L. C. ibid. p. 672
[10] op. cit.
[11] ibid. p. 667-8
[12] Cotman v. Brougham (1918) A. C. 514
[13] (1887) 12 App. Cos. 409 at 433

> *The Act of 1862 requires that the objects...be stated in its memorandum... Further every limited company is required to state in its memorandum the amount of capital with which it proposes to be registered... that is equivalent to a declaration that the capital is to be devoted to the objects of the company.*[14]

The Courts had confused the *ultra vires* doctrine with cases where the company is restricted from misapplying the assets and capital of the company or reducing its capital. A company that reduces its capital without following legally laid down procedure or paid back its capital to shareholders would have acted illegally.[15] in law and in fact, the objects of the company have to be stated in the memorandum of association. Further, the shareholders' liability is limited to the amount unpaid on their shares, and that the share capital cannot be reduced without the sanction of the court. It follows that assets representing share capital must not be returned to shareholders. This rule is in no way related to the entirely different rule concerning *ultra vires* activities. The objects required to be stated are the proposed activities of the company which the capital of the company shall be applied ultimately make profit. the aim of all shareholders is to make profit, which is the dividends accruing from the application of the companies assets to trading. It follows that it is not a requirement, because it is an assumption that need not be stated, that when profits are made it is shared in form of dividends, and so need not be stated in any objects clause of the company.

CONSTRUCTIVE NOTICE RULE

The constructive notice[16] rule was established even before the ultra vires doctrine. It was based on the fact that the law made provisions for the registration of the memorandum and articles of associations of the company and other important documents. Once registered, these document constituted notice to the whole world. It followed that anybody dealing with the company must first take steps to inquire from the registered documents for the company,

[14] Op. Cit P. 433, See also, Stirling J. in Leads Estate Building and Investment Co. v. Shepherd 36 Ch. D. 778 at 787 Chatty J. in Guinness v. Land Corporation of Ireland, 22 Ch. D. 349 at 358, See also Cotton L.J in the same case at page 375, Jessel M.R. in Flit cross casa 7H.L. 684 at 687

[15] S. 159-165 CAMA 1990, S142-145. The Companies Act 1985 (England)

[16] Royal British Bank v. Turqhourd (1856) 6 E & B 327, Exch ch

not only the permitted activities of the company but also the power exercisable by the organs of the company. The rule was clear that anyone dealing with the company was deemed to have notice of the registered documents which were regarded as public documents. This rule was evolved to protect the company shareholders and innocent investors, how this is done is doubtful. However, from the authorities, the rule only works hardship on third parties especially those dealing with the company in good faith.

The adverse effect of the constructive notice rule is exemplified by the case of Re Jon Beauforte (London) Ltd[17] the objects of an insolvent company was the manufacture of dresses but it deviated into the manufacture of veneered panels. The claims of the creditors of the company who supplied the raw materials for the panels were declared ultra vires because they have constructive notice of the objects of the company. Even the claim of a supplier of healing fuel which would have been used for intra vires activities, failed since the fuel was ordered on the company's note paper which read "veneered panel manufacturers." The court held that on that basis, the supplier had actual notice of the present business of the company.

The complication is that when the articles of association place certain limitations on the power of director, or where certain acts ought to be done by the General Meeting and it was not done such irregularities will be held void as it is contrary to the company's registered regulation and the third party is presumed to be aware of these self imposed conditions.

"The result, therefore, of this constructive notice rule was that where the business being carried on by the company is known to the other party and whether he actually knew it or not, is Ultra Vires, he would be unable to sue the company. This rule worked injustice on third parties, who dealt with the company without reading the registered documents of the company. To mitigate the injustice occasioned by the rule, the court introduced the rule in the case of Royal British Bank v Turqand [18] By this rule, a person dealing with a company is bound to ascertain the public document of the company to see that the proposed transaction is not ultra vires. Having done that, he is entitled to assume that all matters of

[17] (1953) Ch. 131
[18] (1856) 6 E & B 327

internal management have been complied with. This general rule is subject to some exceptions. The latter rule would not apply-

1. Where the third party knew or ought to have known of the irregularity[19]
2. When the irregularity results in the third party relying on a document which is a forgery[20]
3. When the third party has failed to make any investigation after being put on enquiry by unusual circumstances[21]

It is important to note that constructive notice rule has been abolished both in Nigeria [22] and the United Kingdom[23]. The effect of the abolition of the constructive notice rule is discussed below.

EVASION 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.[24]

The main purpose of incorporating a business is to make profit the very essence of business must not be hampered by rules that were fashioned to protect the company and its shareholders in the first instance. The rule, is also a veritable and dangerous pitfall for unwary third parties dealing with the company, and an escape route for dubious company executives to escape legally binding obligations[25]. A clear example is the case of Introduction Ltd v National Provincial Bank. Ltd[26] the memorandum contained diverse objects and powers

[19] Howard v Patient Ivory Company (1888) 38 CLD. 156
[20] Ruben v Great Fingail Consolidated (1906) A.C. 439.
[21] Kredit Bank Cossel v Schenkers (1921) I KB 826, Obaseki v. ACB Ltd. (1966) N.M.L.R. 35, see also, S 69 CAMA 1990, S 35 The Companies Act 1985 (U.K.)
[22] S68 Companies and Allied Matters act, Cap C20 Laws of the Federation of Nigeria, 2004. (CAMA).
[23] S35 The Companies Act 1985 (U.K.)
[24] See O. O. Oladele "Reform of Ultra Vires rule in Nigeria, Coupon Law, (1996) Nigeria Current Law Review" 141, Giera Sophira, "Ultra Vires Return" (1984) L.Q.R. 468.
[25] Cohan Committee, op.cit.
[26] (1969) All ER 337, See also Re Horsely and Weight Ltd (1982), Rolled Steel Ltd v. British Steel Corporation (1986) ch 246

of which one sub-clause empowered the company to borrow money as it thought fit, and in particular by the issue of debenture. The company began pig breeding as its only business and borrowed money from its bankers on security of debentures. The bank, before taking the security, was given a copy of the memorandum and articles of association and knew that the sole business of the company was pig breeding. However, the company was incorporated for the purpose of providing facilities for overseas visitors to a festival in Britain. The company went into compulsory liquidation. The bank contended that its only obligation was to satisfy itself that there was an express power to borrow money and that the bank was unaffected by the knowledge that the activity on which the money was to be spent was ultra vires the company. The Court held that borrowing money was a power not an object, and since a power could not stand by itself, and powers could be exercised only for the purposes intra vires the company, the company was not entitled to borrow money for the ultra vires purpose of pig breeding. As bank knew the purpose of the borrowing, it could not rely on its debenture.

The courts, apparently realizing the unnecessary handicap the rule might work on third parties especially, introduced the reasonable rule of interpretation of objects clause, in the case of A.G. v Great Eastern Railway[27] The House of Lords in England held that the ultra vires doctrine would be applied reasonably so that whatever may be regarded as reasonably incidental will be intra vires to the carrying on of the company. Lord Selbourn explained the rule thus,

> *The doctrine of Ultra-Vires ought to be reasonably and not unreasonably understood, and applied whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorized ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires*[28]

Three years after this decision, the court ruled that the act must be incidental to and connected with the carrying on of the company's business, and this does not cover cases where the company resolves to compensate directors or other officers for past services.[29] This rule however, is a great relief from the strict application of the

[27] (1880)5 A.C 473
[28] Op. Cit 480
[29] Bowen L.J. in Hutton v West Cork R/Y Company (1883) 23 Ch D 645

rule[30] The company will not want to leave things to chance, and so most company's after listing diverse objects, introduced into the object clause authority to do "all such business and things as may be incidental or conductive to the attainment of the above objects" or any of them. The court held such clauses to be valid.[31] The problem is how to determine what is reasonably incidental, which is more difficult when the company decide to stretch this liberal interpretation to justify gratuitous payment to employees especially during liquidation. In Hutton's case, the company made no provision for remuneration of director and none was paid. Having sold its undertaking and resolved to go into liquidation, the company, at a general meeting, decided to pay certain sum of money to the directors for past services. A debenture holder opposed this action, The court held it was ultra vires, Bowen L.J made his popular pronouncement that,

"The law does not say that there are to be no cake and ale, except such that are required for the benefit of the company, it is not charity sitting at the Board of directors qua charity, there is however a kind of charitable dealing which is for the interest of those who practice it and to that extent and in that garb charity may sit at the board but for no other purpose"[32]

In the reasoning of the court, such payment is a gift and if allowed would amount to gratuitous payment of the assets of a company, which would be unfair to creditors. Even if the directors have power expressly or impliedly to make such payment it would be ultra vires unless they can prove that it is reasonably incidental to the objects of the company or to achieving them[33] . This was the situation in the case of Re Lee Brehens & Company Limited[34] Eve J, emphasizing the rule held, that "there is no doubt that the company has power to make such arrangement but it must be reasonably incidental to the carrying on of the business of the company".[35] He went further to lay down the three tests to be applied in such case, these are:

1. Is the transaction reasonably incidental to the carrying on of

[30] Deucher v. Gas Light and Colour Company (1934) All E.R 720
[31] Evans v Bruner Mond & Co. Ltd: (1921) 1 Ch 359
[32] Op. Cit Page 673
[33] Re Horseley & Weight Ltd Op. Cit
[34] (1932) 2 Ch. 48
[35] (1970) Ch.62

the company's business?

2. Is it bona fide?
3. Is it done for the benefit and to promote the prosperity of the company?

The rule as laid down was rigidly applied. Even if the company's object allows it, the court still ruled that it must be for the benefit of the company, so as to promote the prosperity of the company. If not, it is declared ultra vires.

Obviously, whatever is ultra vires may only be determined from the object clause of the company and not by judicial interpretation and supposition. A provision in the object clause to provide for the officers may in fact be beneficial to the company in the long run; as Pennyquick J. made clear in the case of Charterbridge Corporation v Lloyds Bank[35] that when a disposition is made bona fide pursuant to and express object, "the test of benefit and prosperity" is irrelevant (unless the object clause so specified). Eve J's dictum[36] is quite inappropriate to the scope of express powers.[37] . The Court of Appeal in England clearly explained the law, that the express object made the pension intra vires whether or not it was of any benefit to the company, and that in the absence of misfeasance, the unanimous informal assent of all share holders is binding on the company[38] Oliver J. in Re Holt Garage Ltd[39] agrees and went further to declare that (1) in the absence of fraud, such payments under express powers of the objects clause were not to be tested by reference to any benefit to the company' so long as they were 'genuine' and not a "dressed up gift to a shareholder out of capital". Gifts by the company can therefore not be tested by the benefit to the company rule," but whether there is express provision in the memorandum of association that permits such gifts. The fear of payments out of capital of the company could easily be resolved by basic rule of company law and protection of the company's capital.

In the long run could we allude to a rule which seeks to use the ultra vires doctrine to protect the company's capital when there are sufficient rules of company law that have done this? The point

[36] Supra

[37] See Buckley J, in Re Horsely and Weight (1982) 3 W.L.R 440, See also Rolled Steel (1982) 2 W.L.R. 736

[38] op cit

[39] supra

made by the authorities is clear, ultra vires doctrine is not to be used to check payments of money to employees, whether beneficial or not. We may need to seek repose in other areas of the law.

The issues may not but however be so simply resolved, as the courts find it difficult to appreciate that business decision are made by directors which may not necessarily translate into immediate financial benefits to the company but may actually be an impetus for its growth and ultimate advantage. In the Nigerian case of Confidential Chemists Ltd v Dr. Ifeakandu,[40] the company decided to train the defendant and pay for his studies in England, his part of the bargain being that on his return to Nigeria he would serve and practice under the company continuously for five years on a certain salary scale. He finished his studies in England and come back qualified in Nigeria. As a medical practitioner, he took up employment in the company's clinic. The parties soon fell out. The defendant left the company and set up his own clinic, and the company sued for breach of their agreement. The defendant raised the issue that the contact was totally ultra vires the company. The object, of the company includes inter alia.

a. To import and export drugs;
b. To buy and sell drugs;
c. To manufacture drugs;
d. To compound drugs;
e. To enter into business which the directors think will increase the profit of the company;
f. With additional clause that "the company will do all such business and things as may be incidental and conducive to the attainment of the above objects and power or any of them.

The trial Judge found the company was running a hospital business which it had no power to do under is objects, and dismissed their claim. The company on appeal to the Federal Supreme Court of Nigeria contended that the final and ancillary paragraph of the company's objects permits the contract with the defendant. The court held that the fair meaning of duty to serve and practice "under the company was to practice as a doctor. The last paragraph of the

[40] (1966) I ALL N.L.R.I

company's objects (which spoke of any business which the directors though would be profitable was indefinite and useless.

Promoters of company had for long discovered that it makes good sense to boost the objects by including from the onset every conceivable business that the company may wish to engage in future. The court however, clearly do not wish to be deceived, and they responded by using the 'main object rule of construction' that there could only be one object of the company. That other clauses were merely ancillary to the main objects, and will be construed as such. So that in a case where the company was formed to acquire a patent, and the patent was never acquired the court held that the company may not engage in any other business as the "substratum of the company" was gone[41]. The court even went further in another case to use the name of the company to determine the main object, and ultimately decided that the substratum was gone when the main object was no longer feasible, and the company must be wound up [42]. The other way in which the main object rule of construction might work is by applying the ejusdem generis rule of construction. Where specific objects are followed by general words, the latter would be deemed to be limited to the thing of the objects already specified. In other words, subsidiary clauses that follow main object would be treated as incidental objects which are meant to facilitate the carrying on of the main object clauses.

Lawyers responded by introducing the 'independent object clause' by listing all the objects of the company and concluding with an omnibus clause that, each "clause shall not be restricted or limited by reference to any other clause or 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 has declared that the clause cannot be ignored, and so it is valid[43]. So we see a continuous erosion of the rule and a gradual disintegration of the Courts' strict adherence to position. The coffin was finally constructed for the rule when the court acknowledge the subjective clauses as used in the case of Bell Houses Limited v. City Wall Property Limited[44], The Court of

[41] Re German Date Coffee Co. (1882) 20. Ch D. 169 at 188

[42] Re Crown Bank (1890) 44 Ch. 684, See also Re Kitson & Co. Ltd (1946) 1 All E.R. 436

[43] Cotman v Brougham (1918) A.C. 514, Anglo-Overseas Agencies v. Green (1969) 3 All E.R. 344

[44] (1965) 3 All E.R 427 at 435

Appeal in England[45] overruled Mocatta J in the lower court, and held that a sub-clause by which the company was empowered to carry on any other trade or business whatever which could in the opinion of the Board of Directors be advantageously carried on by the company in connection with or ancillary to any of its business" is valid, and validates all transactions which in the opinion of the director only, is advantageous to the company. This departed from what North J. had said that such a clause would not be a statement of the objects of the company as required by the parliament[46], One would have though that the Supreme Court of Nigeria would perceive the international trend and follow the English Court of Appeal decision. Many writers have given divergent views on the matter. Jill Cottrell[47] seems to suggest that the sub-clause in the case of Bell Houses is narrower than the sub-clause in Continental Chemists' object clause: The issues involved are however wider than this, and fine point of law and rules of interpretation are jettisoned by the Supreme Court in order to bend backwards to maintain the status quo. The Supreme Court relied solely on the obiter dictum of North J. in Re Crown Bank [48] in invalidating the subjective clause, and agreed with the decision of Mocatta J. It is submitted that this decision is unfounded and unjustified, and that if the situation should present itself again, the Supreme Court should reach a different decision even without S. 39 of the CAMA.[49]

Wedderburn is of the view however, that the position taken by the Court of Appeal is correct based on the proper interpretation of the objects, and inevitably the court has destroyed altogether the vitality of the ultra vires principle. With a well drafted sub-clause permitting the company to engage in any business which in the opinion of its director is advantageous and or profitable no one need worry about the doctrine any longer.

[45] (1966) 2 Q.B.D. 656
[46] (1890) 44 Ch, 634 at 644
[47] Ultra Vires is alive, and Living in Nigeria', The Nigeria Journal of Comparative Law, Vol 3, No 11
[48] Op. Cit at 644
[49] See, Anifalaje, The Lacunae in the Nigeria Companies Amendment Bill 1981 (1982, Nigeria Current Law Review 287, Bakibinda "The Utility of the Ultra Vires Doctrine An Appraisal of the Anglo Nigeria Position (1983) 1 A.B.U.L.J. 110, Jill Cottrell Op. Cit, Wedderburn, Death of Ultra Vltra Vires 1966 M.L.R. 637, Kiser D. Barnes, Cases and Materials on Nigerian Company Law P. 143.

In view of the above development, could we say that the doctrine is still alive, or we are already witnessing to its funeral? Is the view of the Jenkins Committee, that "in consequence the doctrine of ultra vires in an illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company and... As now applied to companies, the Ultra Vires doctrine serve no positive purpose but is, on the other hand, a clause of unnecessary prolixity and vexation[50]

The fundamental issues involved may be further examined and reassessed. The underlying rationale for the role was for the protection of the shareholders and also third parties dealing with the company. As the law stands, does it really protect this two chasses of people. If abolished is there enough in built mechanism in company law to protect these class of people? For this reasons some have advocated for a limited review of the law.[51] The Law Reform Commission in Nigeria clearly stated after reviewing the developments in the law, that "the result of these developments is that Ultra Vires doctrine no longer protects the interest of the share holders and creditors[52]

ALTERATION OF THE COMPANY'S OBJECTS CLAUSE

As pointed out above, the foundation of ultra vires doctrine is the law prohibiting absolutely any alteration of the company's objects. However, the law has since changed in England and elsewhere. In Nigeria, for instance, Section. 45 and 46 of CAMA specifically allows a company to alter its objects by resolution. In England, the now repealed Companies Act 1948 made provisions for the alteration of company's objects, while sections. 16 and 17 of the English Companies Act 1985 also permit, alteration of the memorandum of association by special resolution (subject to certain conditions).

The practical effect of all this in relation to the ultra vires doctrine is that in situations where the company decided to engage in seeming ultra vires transaction, and any party object's in court, and it is transaction the majority intends to pursue they will simply

[50] Report on the Reform of the Companies Law in England, Cmmd 1749 P. 10
[51] Asomugha, Company Law in Nigeria, Under the Companies and allied Matters Ac P. 82
[52] Law Reform Commission on Reform of Nigerian Company Law. Part 1, P. 54 para 126

ask for adjournment to regularizes, their position, and poss. a special resolution to this effect and therefore validates the action. In the event, that the transaction is executed the issued is closed and cannot be set aside or invalidated.[53]

The ability to alter to the memorandum of association by special resolution therefore deals a devastating and serious blow on the efficacy of the Ultra Vires doctrine[54]

EFFECT ABOLITION OF CONSTRUCTIVE NOTICE RULE ON ULTRA VIRES DOCTRINE

The constructive notice rule that those having dealing with the company are deemed to have notice of its public documents by reason of their registration has been abolished. Through under the common law, the rule was subject to certain limitations under the rule laid down in Royal British Bank. V Turquand[55] the rule was still in effect until the reforms in England, by virtue of Section. 9 (1) of the European Communities Act 1972, which was later reenacted as Section 35 of the Companies Act 1985, Section 711A of the Companies Act 1989 emphatically declares that;

> "(1) A person shall not be taken to have notice of any matter merely because of its being disclosed in any document kept by the Registrar of Companies (and thus available for inspection) or made available by the company for inspection"

While in Nigeria, Section 68 also specifically abolished the constructive notice rule and made a provision almost in pari material with the position in England, Section 69 of CAMA went on to declare that any person having dealings with the company is entitled to presume that the company's memorandum and articles have been duly complied with.

The result of all this is that those dealing with the company are no longer deemed to have notice of the contents of the registered documents of the company merely because it is one of the

[53] S. 39 (CAMA 1990)

[54] See also S. 110, Companies Act 1989 (England) SS.4 therefore allows alteration of the memorandum though if an application is made under S.55 it is not effective until confirmed by the court.

[55] Op. Cit.

company's documents available for inspection at the companies registry. They are thus not disturbed with notice of any special conditions in the memorandum and articles of association. Section 68 (6) of CAMA goes even further to state that third party dealing with any officer of the company is entitled to presume that such officers have "authority to exercise the powers and perform the duties customarily exercised or performed" by such offers. This provision in Nigeria is much more far reaching than the position in England, which limits the presumption to such parties dealing with the company in good faith[56] clearly, the abolition of the constructive notice rule is an expressway to the death of ultras vires doctrine

EFFECT OF THE LEGISLATIVE REFORMS ON ULTRA VIRES DOCTRINE

S. 9 (1) of the European Communities Act 1972 which was reenacted in England as S.35 of the Companies Act 1985 states. "in favour of a person dealing with a companies in good faith, any transaction decided on by the directors is deemed to be one which it is within the capacity of the company to enter into and power of the directors to bind the company is deemed to be free of any limitation under the memorandum or articles"

While the second subsection relieves the other party of any obligation to inquire about any internal matters.

One may criticize this section as being limited in scope and not courageous enough to out rightly abolish the Ultra Vires doctrine in to Professor Dan Prentice who was commissioned to carry out a review,of the doctrine in England submitted a document referred to as, "Reform of the Ultra Vires Rule: a Consultative Document" had recommended that companies "should be afforded the capacity to do any act whatsoever and should have option of not stating their objects in their memoranda". This position was not adopted. Rather the Department of Trade in England, by S 110 of the Companies Act 1989 inserted a new S. 3A as follows.

a) That statement that the company's object is to carry on business as a "general commercial company' means that its

[56] See S.35 A Companies Act 1985

object is to Carry on any trade whosoever, and.

b) That the company has power to do all such things as are incidental or conducive to the carrying on of any trade or business by it.

It also include a new section for which allows the company to alter its memorandum with respect to the object clause.

The effect of the above provisions is to enable the company enter into transaction with outsiders without any limitation by the stated objects. In fact, all general commercial companies may carry any or business, and so may not state any object incidental or conductive to the carrying on of any trade or business by it. It follows that English jurisprudence may have progressively done away with the ultra vires doctrine without really making a declaration to this effect. However, the 1989 Act[57] substituted a new S. 35A and 35B for S 35 of the 1985 Act, and state that

> "The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."

The effect of this provision on ultra vires rule is devastating, as there could be no challenge or opposition to ultra vires acts, neither could the company, or the other party dealing with the company be trapped or prevented from entering into any transaction merely because it was not included in the objects clause. Sub-section (2) however allows a member of the company to bring proceedings to restrain the doing of an act which but for subsection (1) would be beyond the company's capacity, but no such proceedings shall lie in respect of an act done in fulfillment of a legal obligation arising from a previous act of the company"

The ultra vires rule now operates internally and subject to the condition that the act was not in fulfillment of a legal obligation arising from previous act or contract by the company. It follows that an individual member may apply to the court to restrain the company from embarking on ultra vires Act, provided that such Act is not concluded? The question that may ensure is when is an Act concluded? We may say that when the agreements are signed, or

[57] Companies Act 1989 (England) S.118

where there has been part-performance for example supply of raw materials by a supplier to the company, and where the act is pursuant to a concluded contract the member cannot maintain on action. The section will seem to preserve the second exception to the Rule in Foss v Harbottle that a member may sue to prevent ultra vires Act. However in this case the member may need to survive a lot of obstacles, which include the Rule in Foss v. Harbottle itself. As it is, the rule will remain an internal rule in England until it is finally discarded.

In other parts of the Commonwealth, efforts have been made to review the law In Canada, by S. 15 of the Business Corporation Act 1975, 'a corporation is given the capacity of a natural person and vested with all the rights, powers and privilege of a natural person subject to the provisions of the Act. In the case of the Caribbean countries, the Caribbean Company Law provides that the objects and powers need not be, and are not included in the articles, and 'a third party dealing with the company will always be put on his notice that he has to make further enquiries as to the business actually being carried on by the corporation, if he has any doubt. The ultra vires rule no longer has an effect in the Caribbean Countries. In Ghana, section 25 of the Ghana Company Code Bill prepared by Professor Gower, states',

> "A company shall not carry on any business not authorized by its regulations and shall not exceed the powers conferred upon it by its regulations or this code..." The law validates any ultra vires act in favour of a third party and the company."[58]

In Nigeria, the law Reform Commission, on the Reformation of Company law in Nigeria, recommended unambiguously that the rule be abolished.[59] However, curiously, S. 39 (1)[60] provides.

(1) A company shall not carry on any business not authorized by its memorandum and shall not exceed the powers conferred upon it by its memorandum or this Act.

While Section. 38 (1). Provides that "every company shall, for the furtherance of its authorized business or object have all the

[58] S 25 (3)
[59] Low Reform Commission Report (Pt1) P. 58
[60] CAMA 1990

power of a natural person of full capacity, the settle the issue of power, but seem of have made contradictory provision in Section. 39 (1). It is submitted that Section. 39 (1) is unnecessary, and a wrong assertion of a position that no longer exist. Though it is true it may be trying to save an exception to the rule in Foss v Harbottle, which in itself may not really be attainable given the conditions in the Section. 39 itself but also under the Rule in Foss v Harbottle.

Section 39 (3) of the C.A.M.A states:

> "Notwithstanding the provisions of subsection (1) of this section, no Act of the company and no conveyance or transfer of property to or by a company shall be invalid by reason of the fact that such Act, conveyance or transfer was not done or made for the furtherance of any of the authorized business of the company or that the company was otherwise exceeding its objects or powers".

Subsection (1) is therefore subject to subsection (2), subsection 4 allows only (a) any member of the company or (b) debenture holder to maintain and action to restrain Ultra Vires Acts, just like the position in England, in Nigeria, Ultra Vires acts may now be restricted to only proposed actions, not executed or concluded Acts, where they are concluded, no one can raise an objection on the ground of Ultra Vires again. The greatest hindrance to the member or debenture holder who wish to restrain the company in this case the majority from embarking on Ultra Vires action is power to amend by special resolution its objects to include the proposed Act, and therefore the action will be nugatory. In effect proceeding on an Ultra Vires action by company many not really be blocked by minority shareholders or debenture holder.

Unlike the position in England subsection (5) of the S. 39 allows the court to set aside and prohibit the performance contract that is Ultra Vires, while this subsection may seem to help the member of debenture holder opposing the proposed Act, we submit that it does not prevent the company from embarking on any Act, so far as it is able to summon the required majority to amend the objects. The subsection is however useful, as it enables the court to quantity any loss or damage to any party who may have suffered as a result of Ultra Vires Act, and so Ultra Vires Acts are no longer a nullity abolition, and the company or the other party on longer escape just obligations by hiding under the Rule.

CONCLUSION

Though S. 39 (1) of CAMA will seem to preserve the Ultra Vires Doctrine in Nigeria the combined effect of S. 39 (3) and S 38 have destroyed totally its effect, and the Rule may only be raised by a member and debenture holder, so that third parties and even the company may no longer contend that the act is Ultra Vires and so avoid legal obligations. It is also very instructive to not that all executed acts are saved and shall remain unchallenged, under the Rule; while the Acts being challenged remains executory could be challenged on the ground that it is Ultra Vires, but the company may regularizes its position immediately and negative the objection, and where the company had used the subjective clause however, the action shall remain valid.

From the above analysis one may conclude that it may now be impossible to successfully use the doctrine of ultra vires to avoid legal obligations or trap anyone.