



NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 534

COURSE TITLE: COMPANY LAW AND BUSINESS ASSOCIATIONS I

Course Code: LAW 534

Course Title: Company Law and Business Association II

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INTRODUCTION

Under Nigerian company as is the case with company law universally, a company when incorporated or registered with the Corporate Affairs Commission becomes a legal person separate from those who incorporated it.

The company in law is a person just as any human being is a person. The company can therefore own property, enter into contracts, sue and be sued in its name. Upon incorporation, the company has to raise money to finance its business.

It can do this in two ways; first it may issue shares for sale to the public or to private persons if it is a private company. The proceeds realised is the share capital with this money, it could finance its business. Secondly the company may borrow money. It could do this by issuing certificates to its creditors evidencing the indebtedness, with undertaking to pay back at the agreed date and interest rate. The certificate of indebtedness issued by the company is called debentures.

The shares and debentures are called company securities.

Company affairs and business generally is managed by a group of people called the Board of Directors. They manage the company until either their tenure expires or they are removed.

There are other business organizations under which business may be carried on. There is the sole trader and the partnership. The sole trader is a one man business. It is only the partnership and the incorporated company that are businesses carried on by two or more persons.

The major difference between the partnership and the incorporated company is their legal status. While the company is regarded in law as a separate legal person different from its owners, the partnership is not. The owners of the partnership are regarded as one and the

same with the partnership. Thus while partners are liable for the partnership debts, the company shareholders are not liable for the company's debts unless it is an unlimited company.

A company is intended to live for as long as possible or for ever if possible. However, the company could be wound up by court order or voluntarily if the members (shareholders) so wish.

WHAT YOU WILL LEARN

This course deals mainly with how companies are financed and managed. It also deals with the formation, management and dissolution of partnerships. At the end of the course, the student will be able to understand the difference between a company and a partnership from the way both are financed, managed and wound up.

COURSE AIMS

The main aim of this course is to provide basic knowledge of company securities, management and winding up procedure. The course will also educate the students about partnerships as a business organization.

COURSE OBJECTIVES

After the successful completion of this course, the student should be able to know:

- (a) how companies are financed
- (b) how people become members of a company,
- (c) how directors and company secretaries are appointed, their duties and how they are removed,
- (d) the different company meetings and how they are convened,
- (e) the measures put in place to protect minority shareholders and how they could enforce any breach of director's duties if the majority fail to do so,
- (f) the different methods to wind up or dissolve a company,

(g) what a partnership is and the nature of the partnership and how it may be dissolved.

STUDY UNITS

There are twenty-eight (28) study units in this course, classified into seven (7) modules of four units each.

MODULE I

- Unit 1: Company Securities
- Unit 2: Company Membership
- Unit 3: Transfer of Company Shares
- Unit 4: Debentures/Charges

MODULE II

- Unit 1: Appointment and Duties of Directors
- Unit 2: Removal of Directors
- Unit 3: Company Secretaries
- Unit 4: Removal of Company Secretary

MODULE III

- Unit 1: Nature and Types of Company Meetings
- Unit 2: Notice of Company Meetings
- Unit 3: Procedure at Company Meetings
- Unit 4: Company Resolutions

MODULE IV

Unit 1: Majority Rule and Minority Protection

Unit 2: Profits and Dividends

Unit 3: Financial Statements

Unit 4: Financial Audit

MODULE V

Unit 1: Business Reconstructions

Unit 2: Mergers

Unit 3: Takeovers

Unit 4: Defunct Companies

MODULE VI

Unit 1: Winding up by the Court

Unit 2: Voluntary Winding up

Unit 3: Winding up Subject to court Supervision

Unit 4: Major Officers of the Winding up

MODULE VII

Unit 1: Formation of Partnerships

Unit 2: Terms of Partnership

Unit 3: Relationship between Partners and third parties

Unit 4: Dissolution of partnership

COURSE MARKING SCHEME

The following table shows how the examination will be graded for the guidance of the student.

Continuous Assessment	30%
Final Examination	70%
Total	100%

REFERENCE MATERIALS FOR FURTHER READING

1. Companies and Allied Matters Act,(CAMA) 2004
2. Modern Nigerian Company Law by M.O. Sofowora
3. Company Law and Practice in Nigeria by J. Olakunle Orojo
4. Charlesworth's Business Law by Paul Dobson (Sweet & Maxwell publishers UK)
5. Charleswoth's company law (Sweet & Maxwell) by Geoffrey Morse
6. Principles of Modern Company Law (Sweet and Maxwell) by Paul L. Davies

MODULE 1

UNIT 1 COMPANY SECURITIES

1.0 INTRODUCTION

When a company is incorporated one of the requirements it satisfies for the incorporation is the statement of its authorized share capital i.e. the amount it states in its incorporation documents as the total money it intends to raise from prospective shareholders. This money is used in financing the company's business.

Once the company is incorporated the amount it states in its incorporation documents as its proposed capital becomes approved and is then on its authorized share capital. It cannot raise more than that amount from prospective shareholders unless it secures approval to increase it.

The authorized share capital of a company is usually subdivided into smaller units and a monetary value is attached to it to enable the company sell the shares to as many people as are willing to buy. If a company has a share capital of say, N500,000 it may divide it into 500,000 shares of N1.00 each. If it sells the 500,000 shares of N1.00 each, it will then realize its authorized share capital of N500,000 to finance its business.

Share capital is therefore the primary source through which companies could raise money for their businesses.

In some other cases, companies may instead or in addition to the money it may raise through the sale of its shares, decide to borrow money to finance its business. In doing so, it will issue documents (certificates) evidencing that it owes money. These documents are called Debentures.

The share certificates evidencing ownership of shares and the debenture certificates evidencing indebtedness by the company are called company securities.

Shares are however, the primary source of company finance.

2.0 OBJECTIVES

At the end of this unit, you are expected to be able to

- a) Know and define what a company share is
- b) Know the different types of shares
- c) Know how shares are allotted
- d) Know the evidence of share ownership in companies

3.0 MAIN CONTENTS.

3.1 SHARES AS COMPANY SECURITIES.

Shares are securities which companies issue to members of the public in order to raise money to finance their operations. Shares are securities because they represent the financial interest which a person has in the share capital of the company. So long as the company is still in business, the financial interest (shares) of a shareholder is protected by law and cannot be taken away except by lawful means such as by court order or by nationalization provided fair and adequate compensation is paid.(s.24-25,Nigerian Investments promotion Commission Act,(NIPC Act.)2004.

3.2 DEFINITION OF A SHARE

Section 567 of the companies and Allied Matters Act,(CAMA) 2004 defines a share as:

“The interests in a company’s share capital of a member who is entitled to share in the capital or income of such company...”

The interest or ownership of a shareholder in a company is therefore limited only to the value of his shares in the company.

A company upon incorporation becomes a legal person of its own. The law regards the company as a person whose identity is different from that of the persons who finance or work for it. Those who finance the company are therefore not its owners. They only own the money they contribute to the company by way of buying a share in the company's share capital. The shareholders of the company collectively are therefore its owners only in a technical sense i.e. they collectively own the company's share capital with which it finances its operations.

Section 115 of the Companies and Allied Matters Act (CAMA) provides that shares in a company is property (intangible property) which is capable of being transferred from one person to another. Thus a person who owns shares in a company may sell it to another person, collect his money and move on while the buyer takes his place as shareholder in the company.

Since shares are properties, they could be sold or pledged as security for a loan. Shares have book value and premium value.

The book value is the actual value at which the company issued or sold the shares. This value is usually shown in the company's memorandum of Association. It is the book value because the company's book record shows it to be so.

Premium value is the market value of the shares. A share is sold at premium if the market price is higher than the book value. The difference is the premium i.e. the additional amount paid over and above the book value is the premium.

3.3 TYPES OF SHARES

Section 118 and 119 of CAMA 2004 allows a company to create classes of shares. It may therefore issue shares to the public in classes. These classes of shares are also known as types of shares.

The classes of shares companies have in practice been known to issue are as follows.

a) Ordinary shares

These are the usual or normal shares issued by companies. They are called ordinary because they have no special rights attached to them. There is also no restriction on the extent to which they could share in the profits of the company. Once profits are set aside for distribution as dividends to shareholders, the preference shareholders are paid their fixed amount. The balance is distributed to the ordinary shareholders, if the balance is much, they get a large share. If the dividend is less they get a small share. The preference shareholders cannot ask for more than their agreed percentage of the profits even if the company makes more profit than expected.

b) Preference shares

This class of shareholders is entitled to be paid first whenever a dividend is declared. Dividends are profits set aside by the company for distribution to its share holders.

When dividends are declared, the preference shares are paid their agreed percentage first before any other share holder is paid. If for example it is agreed that the preference shareholders be paid 10% of the profits set aside as dividends, then once dividends are declared, they are paid their 10% first, then the remainder if any, may be shared by the other shareholders, otherwise the other shareholders get nothing (if nothing remains).

Preference shares are advantageous where the profitability of a company is not certain. Where however a company has a long history of profitability, like first Bank, Guarantee Trust bank, Nigerian breweries Plc e.t.c which declares huge profits most often, preference shares may not be advantageous. This is so because, once the fixed percentage of the profit declared as dividends is paid to the preference shareholders, what is left is usually large enough to make the share of the ordinary shareholders larger than that of the preference shareholders. For example, let's say a company has 5 preference share holders and 5 ordinary shareholders and the preference shareholders are entitled to 10% of the dividends. If the company declares a dividend of N1m, the preference shares will get N100,000 while the ordinary shares will get N900,000 to share among themselves. The ordinary shares definitely will get more.

It is for the above reason that companies sometimes create participating preference shares. These shares, in addition to the agreed percentage of the dividends, also share in the remaining dividends along with the ordinary shares, thereby benefitting double.

There are also cumulative preference shares. If a company is unable to declare a dividend in a given year, the agreed percentage is carried over to the next year. The agreed percentage accumulates until they are all paid in arrears. Until this is done, no ordinary shareholder gets anything. Preference shares may also be non cumulative. In this case, once dividends are not declared in a given year, the arrears are forfeited i.e. they are not carried over to the next or any other year.

c) Deferred Shares

These shares are also called founders shares. These are shares specifically allocated to the founders of the company or its main

financiers. They are usually settled after the ordinary shares have been settled. The only problem is that instead of the ordinary shareholders taking the balance of what is left of the distributable profits after the preference shares have been settled, the ordinary shares are limited to an agreed percentage of the balance of what is left, instead of all of it. After the ordinary shares take the agreed percentage, what is left goes to the founder's shareholders.

The Investment and Securities Act 2007 requires that Founders shares be disclosed in the company's prospectus and the rights they carry. This is to avoid the situation where the management of the company will use the founder's shares to exploit other shareholders especially the ordinary share holders.

3.4 ISSUE OF SHARES

The memorandum of Association of a company usually carries a share capital clause which states the authorized share capital of the company which is a minimum of ₦10,000 for a private company and a minimum of ₦500,000 for a public company (section 27(2) (CAMA). This share capital is divided into smaller units for purpose of issuance to prospective shareholders. For example a company with a share capital of ₦500,000 may divide this into 500,000 units of N1.00 each, when it sells the 500,000 units at N1, it will realize its share capital of ₦500,000.

A company issues shares when it makes them available for purchase by prospective buyers. The shares may be issued in the classes earlier discussed. Shares may also be issued at a premium, at discount(at less than the book value) or at par value (at the book value).

Section 120 of CAMA allows a company to issue shares at a premium. Shares are issued at a premium if they are sold above the book or nominal

value i.e. shares of 50k if sold at say ₦2 per share are said to be sold at a premium. That is at a profit of N1.50. The N1.50 is the premium.

Shares may also be sold at a discount under section 121 of CAMA. Shares are sold at discount if they are sold at less than the nominal or book value. For example, shares of 50k per share may be sold at 20k per share. They are thus sold at a discount.

However for the above to take place, the company must have passed a resolution at its general meeting authorizing the discount and fixing the maximum amount of discount. The resolution must be referred to the Federal High Court for its approval before the shares could be issued at a discount. Issuing shares at a discount, amounts to a reduction or loss of share capital. The company must therefore set aside part of its net profits to cover the value of the discount.

When shares are issued or sold at par value, it means they are issued at the exact value stated in the company's books. If shares of 50k each are sold at exactly 50k, they are sold at par value.

3.5 ALLOTMENT OF SHARES

Allotment is the issuance/sale of shares by a company to realize its share capital. Allotment is no longer possible if the company sells off all of its shares. It may only allot further shares if it secures approval to increase its share capital to create new or additional shares.

Section 125(c) of CAMA provides that the company may allot its shares to an applicant if it accepts the application and actually allocates shares to the applicant. It is at the company's discretion to decide how many shares it allots to an applicant. It may allot less than applied for, but not more than applied for, other wise the applicant is at liberty to decide whether or not to accept the surplus offer by the company.

Once allotment has been completed, the company shall within one month thereafter make a return (notification) to the corporate Affairs Commission (CAC) on the allotment made. (Section 129 of CAMA)

The return as to allotment is the delivery to the CAC of details of the allotments made. This include the names, addresses of allottees, number of shares allotted to each allottee, the amount paid by each allottee e.t.c

3.6. PROCEDURE FOR ALLOTMENT

- a) After obtaining the prior approval of the Securities and Exchange Commission (SEC), the Company then issues a prospectus containing a profile of the company and an application form. The prospectus is advertised to the public if the company is a public company. If the company is a private company it is prohibited from advertising its prospectus to the public (section 22(5) of CAMA and s.67. Investments and Securities Act (ISA), 2007). It may also issue the prospectus privately to individuals .
- b) The company receives applications from interested persons indicating the number of shares they want
- c) After the closing date for receipt of applications, the Board of Directors of the company or its allotment committee meets and makes the allotment for approval by the company's board of directors. Thereafter the approval of SEC is obtained so that letters of allotment could be issued (s.88, ISA, 2007).
- d) Letters of allotments are issued and share certificates are prepared based on the allotment and sent to shareholders based on SEC's approval. Those who are allotted less than they applied for, also get the balance of their money returned with interest, that is for those who accompanied their

applications with payment for the number of shares they applied for (s.96, ISA 2007).

Those who did not accompany their applications with the payment will be required to pay for the shares allotted to them whenever the company makes calls on them to come and pay up.

However it should be noted that companies whose shares are quoted on the Nigerian Stock Exchange are required to credit the allottees account directly with the shares allotted if they indicated a stock account maintained by the Central Securities Clearing System (CSCS) of the Nigerian Stock Exchange.

- e) Where the shares are paid for in kind, the property is valued and taken over by the company.
- f) A return is made to the CAC within one month of completion of the allotment giving details of the allotment done.

3.7. PAYMENT FOR SHARES

Section 135 of CAMA allows the company to accept payment for shares in three forms

- a) Payment in cash
- b) Payment in Kind
- c) Payment in both cash and kind

If payment is made in kind, the company must independently value the property to find its true value before it credits the owner with shares in exchange for the property. Section 137(1) of CAMA

Where shares are not paid for at all or partly paid for, the subscriber is liable to pay for the unpaid shares at a later date. The demand by the directors for the unpaid shares to be paid for is called 'call on shares'.

(section 133 of CAMA). The subscriber is under obligation to pay for the share allotted to him which he did not pay for at the time of allotment.

The shareholder is entitled to 14 days notice to pay up (section 133(1) of CAMA).

3.8. FORFEITURE OF SHARES

When a call is made and the shareholder fails to pay for the unpaid shares, the Directors shall give him further notice to pay the amount due with interest by a given date, failing which he forfeits the unpaid shares. The Directors by a resolution shall be at liberty to sell off the shares to recover the money. Section 140 of CAMA.

3.9. SHARE CERTIFICATE

Every company that allots shares, shall within 2 months thereafter prepare the share certificates for dispatch to the allottees section. S.146(1) of CAMA. The share certificate must carry the company's seal, the number of shares and the amount paid on them.

The share certificate if missing or lost may be replaced on the payment of a fee prescribed by the company.

A share certificate is prima facie evidence of ownership of the number of shares thereon stated by the person thereon named. (s. 147(1)) of CAMA. A share certificate is property that may be sold or transferred (section 115 of CAMA).

A shareholder whose name is entered in the company's Register of members is called a Member of the company and is entitled to attend and vote at general meetings. Section 83 of CAMA.

The requirement to send share certificates to shareholders may be dispensed with where the shareholders supply a Shares Account with the central securities clearing system of the Nigerian Stock Exchange and the shares of the company concerned are quoted on the Nigerian Stock Exchange. In this case the shares are credited direct to the allottees share account and a notice thereof is sent to him by the company..

TUTOR MARKED ASSIGNMENTS

1. Mr. Terdoo and his five friends pooled their resources together to form a public company. They want to take up shares in the company that will ensure they reap the benefit of their investment for a long time. What type of shares will you recommend for them?
2. Aondongu Nig. Plc wants to issue shares to the public to realize its capital so that it could finance its business. What are the procedures for achieving this purpose?

UNIT 2 COMPANY MEMBERSHIP

1.0 INTRODUCTION

Section 37 of CAMA provides that “As from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name mentioned in the memorandum...”

The subscribers to the memorandum of the company are the shareholders of the company. When the first share holders cease to be, some other persons will take over their shares or may become shareholders by acquiring shares in the company. It is the aggregation (totality) of these shareholders that constitute the company. However these shareholders must have their names entered in the register of members of the company to become members of the company. (s.79 (2) of CAMA). It is therefore only those shareholders whose names are on the company’s register of members that are members of the company. The term “shareholder” and “member” of a company are therefore not the same thing. A shareholder is someone who holds at least one share in a company while a “member” is a shareholder whose name has been entered in the company’s register of members. A shareholder whose name is not entered in the register of members will not be entitled to membership rights.

Every company must have a minimum of two members at any time otherwise the directors who carry on the business of that company with less than two members will be personally liable for the debts of the company. Section 93, & Section 79(1) and (2) of CAMA however defines a member of a company as follows:

- a) The subscribers of the memorandum of Association of a company are deemed to be members and they shall be included in the register of members of the company.
- b) Every other person who agrees in writing to become a member and whose name is entered in the Register of members of the company.

A person agrees in writing to be a member of a company if he acquires shares in the company by allotment, transfer, or transmission etc.

2.0 OBJECTIVES.

At the end of this unit, you should be able to:

- a) The difference between the terms 'shareholder' and 'member of a company'
- b) Those qualified to be members of a company,
- c) How to become a member of a company,
- d) The rights and liabilities of a member

3.0. MAIN CONTENTS

3.1 WHO MAY BECOME A MEMBER

The right and capacity to become a member of a company is open to any legal person, whether a natural person or an artificial person.

However the capacity of infants, personal representatives of deceased shareholders, corporations and Aliens are regulated as follows:

- a) Infants: A person under the age of 18 is not qualified to join in the formation of a company in his own right. He may only join if there are two adults also joining in the formation of the company along with him. In this case, the

- capacity of the two adults cures the incapacity of the infant. (s. 20(2) of CAMA). An infant who joins in the formation of a company shall however not be counted for the purpose of determining the minimum number of members of a company. (section 80 (2) of CAMA).
- b) Personal Representatives: when a shareholder dies, section 148 of CAMA provides that holders of the letters of administration of his estate (properties) of the deceased person, if he died without a will are the ones entitled to the shares held by him. If however he left the shares to some one in a will he made while alive, the person is entitled to those shares. If a deceased person left a will, in that case letters of administration are not applicable. However the benefiting persons do not automatically become members of the company. They must notify the company that they or their nominee should be registered in the Register of members of the company as the new holders of the shares inherited from the deceased shareholder. (section 155 (3) of CAMA).
- c) Corporations: A company upon incorporation becomes a legal person. It may therefore acquire shares in another company. However by section 20(3) of CAMA, a company under liquidation is not capable of acquiring shares in another company.
- d) Aliens: Aliens include foreign companies. They may acquire shares in Nigerian companies. Section 18 and 20(4) of CAMA. Section 17 of the Nigerian Investment Promotion Commission Act, 2004 also permits non-Nigerians to invest in any enterprises in Nigeria that is not prohibited. Aliens must however secure the permits needed for them to enter Nigeria lawfully to carry out their business. These permits include, Business permit, Residency permit e.t.c.

3.2 HOW TO BECOME A MEMBER

A person may become a member by acquiring shares in a company in the following ways:

- a) **By subscription:** At the point of incorporating the company, it is required that the company have at least two shareholders who will sign the memorandum of Association and undertake to take at least 25% of the share capital among themselves (section 27(2)(b) CAMA.. These are the subscribers to the memorandum of the company. Section 79(1) of CAMA requires that as soon as the company is incorporated (i.e. registered) the subscribers shall have their names entered into the company's register of members. The subscribers to the memorandum are therefore the first shareholders and members of the company.
- b) **By Allotment:** Allotment is the process of acquiring shares direct from the company whenever it issues or offers its shares for sale. In this case, when a person applies and is given certain number of shares, he is said to be allotted the shares. When he pays for the shares and his name is entered in the Register of members of the company he becomes a member. S. 125&127 CAMA.
- c) **By transfer.** Section 115 of CAMA provides that shares are properties whose ownership could be transferred from one person to another. A person may therefore become a shareholder if a former owner transfers his ownership of shares to him. This could be by sale or as a gift e.t.c. section 152 of CAMA however requires that the name of the new owner must be entered into the company's register of members in replacement of the former owner, to become a member of the company.
- d) **By Transmission:** When a previous owner of shares dies and his shares are inherited by his personal representatives or heirs, this is called transmission of shares.

Shares may be inherited only by production of probate of a will of the deceased owner or letters of administration of his estate granted by the High Court. (section 148 of CAMA). The beneficiaries of the shares by transmission must have their names entered in the register of members of the company or elect a nominee to hold the shares on their behalf. In this case the nominee's name shall be entered in the Register of members of the company to become a member of the company. (section 155 (3) of CAMA).

3.3 RIGHTS AND LIABILITIES OF MEMBERS

The right of members is stated in section 81 as the right to be invited and to attend any general meeting of the company and the right to speak and vote on any resolutions at the meetings. These rights are subject to the member having paid for all the shares he holds and if he has not paid for them for them, then until the company has made calls he continues to enjoy the membership rights. All a person needs to attend company meeting and vote is to hold and pay for at least only one share. (section 79(3) CAMA) where he holds more than one share but has paid for some, he may still attend company meetings unless the company insists on payment for all the shares.

3.4 LIABILITY OF MEMBERS

The liability of members depends on the type of company they are share holders in.

- a) Company Limited by Shares: The liability of members of a company limited by shares is limited to the amount if any, that may be outstanding on the shares they hold. If however they have paid for all their shares, they have no further liability in the company. Section 21(1) CAMA.

The company cannot force the members to take up more shares than they had willingly indicated to take; even if the memorandum is altered to increase the share capital of the company. (section 49, CAMA).

- b) Company Limited by Guarantee: The liability of members of a company Limited by guarantee is limited to the amount each has agreed to contribute to the assets of the company to meet its outstanding liabilities in the event of winding up, that is if its assets are not enough to settle its liabilities. Section 27(4) (b) of CAMA Thus, the members become liable to bring their agreed contribution if the company is winding up and the existing assets are not enough to pay the company's debts.
- c) Unlimited Company: The liability of members of an unlimited company is unlimited. (section 21 (1) (c) of CAMA). This means the liability stretches to the extent of the liability of the company.

3.5. DISCLOSURE OF INTEREST IN SHARES.

The public company has power to require every or any member to disclose the capacity in which he holds shares in the company. This may be either as a personal owner i.e beneficial owner or as a nominee of another person. This requirement is not binding on private companies. Section 94(1) of CAMA.

The public company must keep a register of interests that shows the names of members with the kind of interest they have in the shares they hold. This register is different from the company's Register of members (S. 97 of CAMA).

The Register of interest must also disclose the identity of substantial shareholders and how their substantial shareholding comes about. A person who holds at least 10% of the voting rights of a public company is a substantial shareholder. He is required to within 14 days of becoming aware that he is a substantial shareholder; notify the company giving his full names and address. He shall also state the

shares held by him and those held by his nominees by virtue of which he is a substantial shareholder. (section 95 of CAMA).

3.6. REGISTER OF MEMBERS

Every Company registered in Nigeria is required to keep a register of members (section 83 of CAMA).

The register may be in bound copies or loose leaves, computer device, photographic film or in any other manner acceptable in commercial usage provided it is retrievable and legible.. (section 550 of CAMA). The register shall be kept at the company's registered office.

The Register contains the names of shareholders, the number of shares held by them, the date a person became a member and the date he ceased to be one.

A person becomes a member of the company only when his name is entered in the register of members. Section 79 (1) & (2) of CAMA. The term "shareholder" and "member" are sometimes used interchangeably; however they are not the same. A person who acquires shares in a company is a shareholder and is entitled to dividends on the shares he holds. However he is not a member of the company until his name is entered in the register of members. Only members may attend company meetings, speak and vote on resolutions at company meetings. To enjoy these rights, a shareholder should exercise his right to having his name entered on the company's register of members.

3.7. INSPECTION OF REGISTER OF MEMBERS

The register of members shall be open for inspection for at least two hours each day to members without charge and to any other person at a charge of N1.00 or less. A member or any other person with the permission of the company may obtain a copy of the register at a cost of 50k per 100 words (section 87 of CAMA).

3.8. RECTIFICATION OF REGISTER

Where the name of a shareholder is omitted from the register, or a person's name is wrongly entered, or default is made or unnecessary delay is occasioned in deleting a shareholders name on the register of members having ceased to be a member, such person may apply to court for rectification of the Register. The rectification is to correct the register to reflect the correct information in respect of the aggrieved person's shareholding status in the company. (section 90, CAMA).

4.0 CONCLUSION.

Shares in a company are also recognized by law as property which may be transferred from one person to the other .There is a market called the capital market where shares could be bought and sold. A good example of this market is the Nigerian Stock Exchange. Companies wanting to raise money for their businesses go there to sell their shares to the public. Those who buy these shares may in turn sell them to others and make their money. In this case there cannot be a restriction on the sale of shares of public companies otherwise the capital market will be inhibited.

Private companies are banned from public buying and selling of their shares, so restriction on the transfer of their shares will not affect the capital market.

TUTOR MARKED ASSIGNMENT.

1. Discuss the various ways a person may become a member of a company.
2. Every legal person has the right to become a member of a company but may not possess the capacity to exercise that right, Discuss.

UNIT 3 TRANSFER OF SHARES

1.0 INTRODUCTION

Shares are recognized as personal property whose ownership is transferable from one person to another. (section 115 of CAMA) the right to transfer shares is however subject to the rules provided for (if any) in the Articles of Association of the Company concerned.

However section 22 of CAMA has statutorily restricted the transfer of shares in private companies. It makes it mandatory for private companies to restrict the transfer of its shares. This is usually done by providing a restriction clause in the Articles of Association of the private company making any transfer of shares subject to the discretion of the Directors. Restriction on transfer of shares under section 22 also includes a prohibition on private companies from public offer of their shares.

Restriction on transfer of shares of a public company is not common because their shares are freely traded on the stock exchange and also offered to the public for sale. The shares may therefore be freely sold and offered for sale to the public. Their transferability may not therefore be restricted except by court order or if the law so provides.

2.0 OBJECTIVES.

At the end of this unit, the student should be able to

- a) Know the legal procedures for transfer of shares.
- b) The restrictions on transfer of shares.

3.0. MAIN CONTENTS

3.1 PROCEDURE FOR TRANSFER OF SHARES

The procedure for transfer depends on whether the seller is selling all his shares or only a part of it.

- a) Where the shareholder sells all his shares: In this case, the seller delivers his shares certificate to the buyer together with a document evidencing that he has sold the shares.

Either the buyer or the seller may then forward the certificate together with the document evidencing the sale to the company for registration. The company must within three months register the transfer of ownership to the buyer and issue him a new certificate showing he is the new owner of the shares. If the company has reason to refuse the registration, it must return the certificate, the document evidencing its sale together with a letter giving reasons for the refusal. Section 146 (2) and section 153 of CAMA.

- b) Where only a part of the shares is sold. Where a shareholder sells only a part of the shares indicated on his shares certificate, or where he sells the shares in bits to different buyers, the procedure for transfer is as follows:

The seller prepares a document evidencing the number of shares sold to the buyer or the different buyers. He then sends the document together with the shares certificate to the company for certification. The company secretary will then stamp the document of transfer with the words “certificate ledged” or any similar words indicating that the buyer has lodged the share certificate for transfer of the shares sold to the buyer or respective buyers as indicated by him. The seller then hands the stamped document to the buyer or buyers.

Either the buyer or the seller will then follow up to have the company issue new shares certificate to the buyer or several buyers showing the number of

shares sold to them. If some shares are still remaining to the credit of the seller, he too receives a new certificate evidencing ownership of the balance of his shares. The company must within three months of lodgment of the certificate and evidence of sale of the shares, issue new certificates as above stated or return the lodged documents with a letter giving reasons for the refusal. Section 146 and 157 of CAMA

If the seller has the electronic central securities clearing system on line stocks account of the Nigerian Stock Exchange, his stock broker will arrange the transfer on his behalf to the respective buyers.

3.2 TRANSFERS ON TRANSMISSION OF SHARES

Transmission of shares occurs when the shares of a deceased share holder are inherited or bequeathed to a heir or personal representative of the deceased shareholder. Where shares are held by two or more persons jointly then upon death of one or more of them, the surviving person shall be entitled to all the shares and they may be transferred to his name.

Where the shareholder held the shares as a sole owner, then his shares may be transferred only to the person named in his will or if he died without a will, then to the person who obtains letters of administration from the High Court in respect of the shares or the deceased's property. Section 148 of CAMA. The above are in Law recognized as the personal representatives of the deceased share holder and are entitled to have his shares transferred to them or their nominee. Section 155 of CAMA.

3.3 RESTRICTION ON TRANSFER OF SHARES

In *Okoya vs. Santilli* (1994)4 NWLR (part 338) 256, the court held that shares are in the nature of personal property and are transferable in the manner allowed by

the company's articles of Association. This is also in line with section 115 of the CAMA, which provides that shares or other interests of a member in a company shall be property transferable in the manner provided in the articles of association of the company.

It therefore follows that the transfer of share is restricted in the manner allowed by the articles.

Section 22(2) of CAMA provides that every private company shall by its articles restrict the transfer of its shares. There is no similar provision relating to transfer of shares of a public company. It means there cannot be a restriction on the transfer of shares of a public company unless so directed by a court of law since there is no statutory requirement for a public company to restrict the transfer of its shares. However, public companies do not put restrictions on the transfer of shares because the shares of a public company may be freely traded on the Nigerian stock exchange.

A private company however must put restrictions on the transfer of its shares as prescribed in section 22 of CAMA as follows:

- (a) Restriction clause: the articles of association of the company usually contains a restriction clause which prescribes that the directors in their absolute discretion without giving any reasons may refuse to approve the transfer of any shares whether or not it is a fully paid up share.
- (b) Pre-emption clause. The articles of association in addition to the restriction clause or as an alternative to it, may provide that no shares of the company may be transferred to a non member unless no member can be found to purchase them at a fair price. The articles may alternatively provide that any member intending to sell his shares must first offer same to the existing members to buy and they may be sold to a non member only if no member is

willing to buy at the market price and the directors must approve of the non-member to buy the shares.

In *Berry and Stewart v. Tottenham Hotspur F.C. Ltd* (1935) Ch. 718. Berry owned one share in Tottenham Hotspur Football club Ltd. He sold it to Stewart. Berry wanted to transfer the share to Stewart and the directors refused to approve the transfer to Stewart of the shares sold to him by Berry. The directors did not give reasons for the refusal. Berry and Stewart sued to enforce the transfer. It was held that based on the restriction clause in the articles, the directors had the right to refuse to approve the transfer of any shares without giving any reasons.

Once the shares have been offered to existing members and they are unwilling or unable to buy them, the shares may be sold to outsiders without the directors having the right to refuse the transfer.

In *Ocean Coal Co. Ltd v. Powell Duffryn Steam Coal Co. Ltd* (1932) 1 Ch. 654, the plaintiff offered his 135,000 shares at £2 to other members of the company with the approval of the Board of Directors. The members were unable to take up all the shares. It was held that the plaintiff was entitled to offer the shares to outsiders to buy since the other shareholders could not buy the shares.

Protection of Beneficiaries under a will: Sometimes a deceased member may name some persons as the administrators of his estate who are to ensure the deceased's properties are distributed and/or managed as stated in the will. These persons therefore inherit the deceased person's shares on behalf and for the benefit of those who are named in the will as the beneficiaries inherit. The administrators therefore only have an equitable right in the shares but not the beneficial rights. This right becomes a legal right only when the shares are transferred to those

entitled under the will. It is the duty of the executors of the will who in this case are the personal representatives of the deceased to ensure that they nominate those entitled to the shares under the will as those to whom the shares should be transferred to. (section 155 (3) of CAMA).

Any person claiming to have an interest in any shares or the dividends or interest on those shares may protect his interest by swearing to an affidavit indicating the nature of his interest and serving the company with the affidavit. The company shall then enter on the register of members the fact that such notice has been served on the company. The company shall therefore not register any transfer of shares of the deceased in respect of which it had received the affidavit of interest.

Any company which receives this notice of interest and in default proceeds to register any transfer in favour of any other person shall be personally liable to the person who lodged the notice of interest for any loss he suffers thereby. Section 156 of CAMA.

The Company shall give notice of at least 42 days to any other person seeking a transfer to him, of the shares complained of , for the matter to be resolved otherwise, the proposed transfer will not be effected. section 156 (2)

3.4. Mortgage/Attachment of Shares

Shares are personal property of value (s.115 of CAMA). They may therefore be mortgaged as security for a loan.

It is a legal mortgage if the shares are transferred to name of the mortgagee as security for a loan.

It is an equitable mortgage if the share certificate is only kept in the custody of the mortgagee as security for the loan.

Shares owned by a person may also be attached and sold in satisfaction of a judgment of a court of law. Order 5 rule 1, judgment Enforcement rules made pursuant to the sheriffs and civil process Act 2004.

4.0 CONCLUSION

Most public companies today are quoted on the Nigerian Stock Exchange where their shares are freely bought and sold. The procedure for sale and transfer of ownership of shares is entirely, different from the one provided by the CAMA. The use of share certificates is being discarded. The Nigerian Stock Exchange has a central securities clearing system (CSCS). Those wanting to buy shares must first open a securities Account with the CSCS through a stock broker. Shares are subsequently bought through a Stock Broker and the shares are credited direct to the customers CSCS Account. If he wants to sell, he merely instructs his stock broker who sells off such number of units as the customer directs. The shares are debited by the CSCS from the seller's CSCS Account and credited direct to the buyer's CSCS Account. The procedure for transfer of shares provided for under the CAMA is fast being discarded for the modern method of crediting customer's CSCS Accounts electronically.

The CSCS sends credit and debit alerts to customers phones to inform them of any transactions in their CSCS Accounts. The existence of the CSCS system does not however do away with the legal procedures for buying and selling of shares as provided for under the CAMA. They only complement or makes the transactions easier.

5.0 TUTOR MARKED ASSIGNMENTS

1. How may shares be transferred from one person to another?
2. What is the legal protection provided by law for beneficiaries of shares who were not directly given legal titles to the shares?

UNIT 4 DEBENTURE/CHARGES

1.0 INTRODUCTION

Companies are incorporated with share capital provision that allows them to sell their shares to raise money to finance the company's business.

Sometimes this money may not be enough. The company may need quick money and so has to borrow from creditors. In doing so, companies usually issue documents acknowledging their indebtedness to creditors called debenture deeds. In some cases, the company pledges its Assets as security for the loan. When this happens the company is said to have created a charge over its assets.

Debentures are usually issued pursuant to the company's borrowing powers which are contained in its memorandum or articles of Association

A debenture is therefore a document issued by the company acknowledging that it owes the sum indicated in the document and obligating itself to pay the sum when due with the interest if any and in accordance with the terms indicated in the document to the person named or as may be directed by him.

2.0 OBJECTIVES.

At the end of this unit, students should be able to:

- a) Know about companies borrowing powers,
- b) Types of debentures,
- c) Rights of debenture holders.

3.0. MAIN CONTENTS.

3.1. COMPANY’S BORROWING POWERS

Section 166 of CAMA provides

“a company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property, and uncalled (unissued) share capital or any part thereof and issue debentures or debenture stock on other securities, whether outright or as security for any debt; liability or obligation of the company or of any third party”.

The company therefore has statutory power to borrow money and issue debentures to acknowledge the debt. It may also create a charge over its assets to secure the loan.

How the company’s borrowing powers may be exercised is however as stipulated in its memorandum or Articles of Association.

The directors must therefore exercise caution to exercise the borrowing powers of the company in accordance with the memorandum or articles of association of the company. If the directors purport to borrow money on behalf of the company but did not act in line with the provisions of the memorandum or articles of association of the company, they become personally liable. The company is not liable and it cannot also ratify the alleged borrowing as to make the company liable because the borrowing is illegal.

3.2 Meaning of Debentures

When a company borrows money, it may give a written acknowledgement to the creditor to evidence that the company is owing the money. The document will usually show the terms of the loan and the mode and date of payment. That document is called a debenture.

In *Levy v. Abercorris State and Slab Co.*(1887)³⁷ Ch. 260 at 264, Chitty J. defined a debenture as “ a document which either creates a debt or acknowledges it and any document which fulfills either of these conditions is a debenture”. The above definition agrees with the CAMA which defines a debenture as ‘a written acknowledgement of indebtedness by the company setting out the terms and conditions of the indebtedness...’(s.567 CAMA.)

A debenture may be secured or unsecured.

A debenture is secured when it is guaranteed by a charge over the assets of the company so that in the event the company is unable to pay, the assets charged may be taken and sold by the creditor to recover his money.

A debenture is not secured if the debt is not secured by any assets of the company.

3.3 TYPES OF DEBENTURES

In company practice, debentures are recognized in the following types:

1. Perpetual debentures. These are debentures that are intended to be permanent i.e. irredeemable or which may be redeemed only on the happening of an event or after a fixed period of time in which case until the event occurs or the fixed period reaches the debenture cannot be redeemed. Section 171 of CAMA
2. Convertible debentures. These are debentures that have the option of being converted into shares of the company at the option of the company or the debenture holder, depending on their agreement. S. 172 CAMA.
3. Secured and naked debentures. A debenture is secured if it creates a charge over the company’s assets or any part thereof. The charge may be fixed i.e. over a specified asset of the company or a floating charge i.e. which may attach any available asset of the company if the debenture is not redeemed when it is

- due.. A naked debenture is one which is not secured by any charge over the company's assets or any part thereof. Section 173 of CAMA
4. Redeemable debentures. These are debentures that are redeemable at any time by the company. section 174 CAMA.
 5. Bearer debentures. These are debentures that are payable to whoever presents them for payment. They are therefore negotiable instruments.
 6. Registered debentures. These debentures are payable only to those mentioned in the debentures as the registered holders.

3.4 DEBENTURE TRUST DEED. SECTION 183 OF CAMA

Where a company has issued several debentures of different classes discussed above, to the public, it must execute a debenture trust deed in respect of each class of debentures. The company will execute the trust deed on behalf of each class of debenture holders, get trustees that will manage the debenture and protect the interest of the debenture holders.

The debentures that are entitled to have a trust deed are either of the following

- a) Holders of debentures that are entitled to participate in any money payable by the company under the debenture deed; or
- b) Holders of debentures that are covered by a mortgage, charge or security created by the debenture deed.

The advantage of a debenture covered by a trust deed is that as soon as it becomes clear the company is unable to pay its debt, the trustees of the debenture holders will move in to ensure that the debentures covered by the trust deed take priority

over other company debtors in taking over the company's property to secure the interests of debenture holders covered by the trust deed.

3.5 ISSUE OF DEBENTURES

Where a company wishes to raise money by way of loan, it may issue debentures. This is a certificate indicating the company owes a specified amount which will be payable at a later date with agreed interest. The certificate may be of a fixed sum of say N1000 each. A person may buy several of them as his money can buy.

Where the debentures are to be issued to the public by a public company, then it must issue a prospectus as if it is issuing shares to the public.

In this case it must create a trust deed under which trustees will be appointed to take care of the secured debentures under the debenture trust deed. S. 183(1) of CAMA.

3.6 CHARGES SECURING DEBENTURES

When a debenture is secured by creating a charge over the assets of the company or a part whereof, it is called a charges secured debenture.

The debenture is a Naked Debenture if it does not create any charge over the company's assets.

Fixed charges. This arises when the debenture is secured by creating a charge over some specified or fixed assets of the company, such as land, machines, e.t.c. In this case the debenture is also said to be a mortgage debenture because by creating the fixed charge, the company has mortgaged the assets and cannot deal with it as it pleases.

Floating charges. This is a debenture which does not create a charge over a given asset of the company. The charge is a general one which can attach to any asset of the company available except those already subject to a fixed charge.

Registration of charges. Once a company creates charges over its property, it shall within 90 days thereof deliver a notice to the corporate Affairs commission (CAC) for registration of the charges created. The CAC will then issue a certificate as evidence of registration (section 197(1) and 198(2) CAMA).

It is therefore important that one conducts searches with the CAC before taking up debentures with a company to be sure the assets are not already subject to a mortgage by the company. The charges once registered take precedence based on whose charges are registered first.

The company is also required by law to keep a register of charges it creates over its assets. Section 191 (1) of CAMA.

The company must also keep a register of its debenture holders (section 193 (1) of CAMA.

The two registers mentioned above are open for inspection and copies may be obtained on payment of the prescribed fees. (section 192 and 194 of CAMA.) Persons wishing to take up debentures with a company should insist on inspecting its register of charges and register of debenture holders to be sure the properties are not already mortgaged.

3.7 REMEDIES OF DEBENTURE HOLDERS.

1. The debenture holder is primarily a creditor who is entitled to his money (principal) with the interest agreed upon the arrival of the date agreed for payment.

He may therefore sue the company to recover his principal and interest (section 176 (2) and 209 (2) CAMA.

If he gets judgment in his favour, he may levy execution on any property of the company.

2. Petition for winding up. Under section 408 (d) and 409 of CAMA, it is a ground for compulsory winding up if a company is unable to pay a debt of any sum above N2,000 if a demand is made and the company is unable to, within 21 days pay up the debt.
3. Power of sale. The debenture holder has power of sale in two ways :
 - a) Where the debenture deed contains a power of sale, then a debenture holder may move in to take over and sell the asset charged or chargeable under the debenture document. This is done by appointing a person as receiver to take over the property concerned s. 209 (1) CAMA.
4. Right of foreclosure. Section 209 (2) (b) (i) of CAMA. The debenture holder may seek an order of court to foreclose the property of the company that was subject to the debenture. In this case the company loses ownership of the property to the debenture holder.
5. Appointment of a Receiver/manager. Section 180 (3), 209(1) of CAMA whenever payment to secured debenture is due and remains unpaid, the secured debenture holder may appoint a receiver or receiver/manager if the debenture deed contains such a power. If no such power is provided, the debenture holders may apply to court for the receiver to be appointed. The receiver takes over the charged assets by taking further steps to realize the money.
6. Proving for balance on winding up. In practice a secured debenture ranks among the priority debtors to be paid from the sale of the company's property during winding up. If he had not gotten all or any of his money, he may sue the liquidator of the company for the balance of his money.

4.0 CONCLUSION.

Debentures are another form of company securities which may be used to raise capital for the company. This capital is called loan capital. A company may therefore raise money either through share capital or loan capital.

5.0 TUTOR MARKED ASSIGNMENT

1. Discuss at least five remedies open to debenture holders whose money become due but are not paid.
2. Discuss the advantages of secured debenture holders over naked debentures.
3. Discuss the types of debentures known to law.

MODULE 2

UNIT 1: APPOINTMENT AND DUTIES OF DIRECTORS.

1.0 INTRODUCTION

A Director is a person duly appointed to direct and manage the business of a company (section 244 of CAMA). This definition covers any person occupying the position of director in a company irrespective of the name by which he is called (section 567 CAMA) thus a person who performs the functions of a director is a director even if he is not called by the name director.

The term also extends to persons on whose instruction or directions the directors of a company are accustomed to act. This category of persons are referred to or called shadow directors (section 245 of CAMA). The company has two major organs, the General meeting and the Board of Directors. (section 63 of CAMA) these two are the alter ego. They are therefore not servant or agents of the company when they act as a board or general meeting. They are the company itself. Individual directors who take up appointment with the company are in that capacity its agents i.e. Managing Director etc. It means that some directors are employees of the company (they are called executive directors). There are directors who are not employees of the company (they are called non-executive directors. s.282 (4) CAMA.

2.0 OBJECTIVES

This unit will enable you know

- (a) who a director is in law
- (b) the types of directors and how they are appointed
- (c) the duty of directors, and how Directors powers are exercised

- (d) How directors are removed.

3.0 MAIN CONTENTS

3.1 Types of Directors.

- (a) Non Executive Directors; These are Directors who do not hold any employment with the company as directors i.e. their position as directors is not by virtue of their being employed and paid salaries in the company. They only collect sitting allowances.
- (b) Executive Directors: these are persons who are employed by the company as Directors under a contract of employment. Executive directors are responsible for the day to day running of the company, while non Executive directors only attend periodic meetings of the Board of Directors where company policies are formulated for the Executive directors to implement. (Section 282 (4) of CAMA).
- (c) Alternate Directors: These types of directors are usually created by the Articles of Association of the company. They are directors appointed by a serving director to seat on the board in his place in case he has to be absent.
- (d) Shadow Directors: these are persons on whose directives and instructions the Board of Directors is accustomed to act. This refers to those who control the decisions of the board from behind the scenes. (Section 245 of CAMA).
- (e) Directors by estoppels. Section 250 and 260 of CAMA. Where a company holds someone out as its director and he so acts, the company is bound by his acts and the defect in his appointment i.e. the fact that he was never appointed in the first place will not be a defence for the company.

3.2 Number of Directors

Every company shall have a minimum of two directors at any time. (section 246 of CAMA). The company may by its articles of Association fix the maximum number of its directors (S.249 (3) of CAMA).

3.3. Appointment of Director.

1(a) First Directors; By section 247, a first director is a person named in the memorandum of the company by the first subscribers (shareholders) of the company as director

- (b) They may also be named in a clause in the articles of Association of the company as directors at the point of incorporating the company.

2. Subsequent Directors

Apart from those who were the first directors appointed at the incorporation of the company, all others after them are subsequent directors. They may be appointed in the following ways:

- (a) By power under the articles. Section 41(3) of CAMA. The articles of Association may confer power to appoint or fire any director on a person whether within or outside the company.
- (b) By order of a court. (section 248 (2) of CAMA). Where all the directors and shareholders of a company die, any of the personal (legal) representatives of the deceased shareholders may apply to the court for an order allowing them to convene a meeting of the company to appoint new directors for the company. If they fail to do so, the creditors of the company may do so.
- (c) Life director. S. 255 and 262 of CAMA. A person may in the articles of Association be named as a life director of the company. He may notwithstanding be removed either by amending the articles

to delete the clause appointing him life director or he may be removed by an ordinary resolution of the general meeting of the company subject to payment of damages to him for breach of his tenure of office. S.262 (6) CAMA.

- (d) Appointment to fill casual vacancy. (section 249 (1) of CAMA). Where a director dies, resigns, retires or is removed before the expiry of his term of office, the Board of Directors may fill that vacancy. Such persons will be in office only until the next General meeting when they may be re-elected or removed.
- (e) Election of Directors. Section 259 of CAMA. Unless the company's articles of Association otherwise provide, all the directors of a company shall retire at the first Annual General Meeting of the company. At subsequent Annual General Meetings, one third of the Directors shall retire in the order of seniority. At these meetings, as the directors retire, those who present themselves or are nominated are voted in as directors to replace these retiring unless they are re-elected.

3.4. Rotation of Directors;

Section 259 of CAMA provides for rotation of directors as earlier noted in 3.2 above. The position in section 259 applies only if a company's articles of Association are silent on the order of rotation (or retirement) of Directors.

1. At the first Annual General Meeting all the Directors retire for fresh elections to take place. Retiring directors are eligible to re-election.
2. At every subsequent Annual General Meeting, one third of the Directors shall retire. If the number is not a multiple of three i.e 3,6,9,12,15,18, e.t.c. The number nearest to one third shall retire.

The directors shall retire based on seniority in date of first appointment.

If those qualified to retire are more than one third, lot will be cast to determine the one third to retire i.e if 6 persons were appointed the same day and one third is to retire in their order of seniority only 2 will retire. To decide the 2 out of the 6 that will retire, lot will be cast since they all came in on the same day unless 2 volunteer to retire..

A retiring director who offers himself for re-election is deemed to be re-elected automatically unless:

- (a) Another person is elected to replace him, or
- (b) It was expressly resolved at the meeting not to fill the vacancy created by his retirement, or
- (c) A resolution for his re-election is put to vote but lost.

3.5. NOMINATION AND VOTING OF DIRECTORS

S. 259(4) and 261(3) of CAMA.

- (1) retiring directors are eligible to offer themselves for re-election
- (2) persons other than retiring directors shall be nominated by the Board of Directors; or
- (3) such persons may in the alternative be nominated by any member of the company in writing to the company by depositing the notice of nomination with the nominee's consent in writing with the company at least between 21 days to 3 days to the date of the Annual General Meeting where the election will take place. The person proposed must himself accept the nomination in writing.

Unless the articles otherwise provide, the appointment of directors is by ordinary resolution.

In a public company, each director is appointed by a separate resolution. In a private company however, the director may all be appointed by a single resolution. Section 251(1) of CAMA.

3.6. Age of Directors

The minimum age for appointment of a director is 18 years there is no maximum. Section 257 (1) (a) of CAMA.

However for a public company to appoint a person of 70 years or above, special Notice of 28 days must be given to the company (section) 256 of CAMA) The company must in turn state in its notice of the General meeting concerned that it is proposed to present a person of 70 years or above for appointment as director (section 256 of CAMA).

The person himself shall disclose this fact to the members at the general meeting.

3.7. Fiduciary duties of Directors (loyalty and good faith.)

- (a) The directors must observe utmost good faith towards the company in any transaction with or for the company S. 279 (1).
- (b) They must act at all times in what they honestly believe to be in the best interest of the company. S. 279 (3) and (4).
- (c) They must exercise company powers for the purpose specified and not for personal benefit. S. 279(5).
- (d) They must not compromise their discretion to vote in a particular way in any Board resolution S. 279 (6)
- (e) They must not delegate their powers in circumstances that amount to abdication of duties S. 279(7).

3.8. Directors Duties of care and skill s. 282

Every director shall exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances.

In Re City Equitable Fire Insurance Co. LTD (1925) Ch. 407, Romer J. laid down three yardstick for this duty as follows:

- (a) a director need not exhibit in the performance of his duty a greater degree of skill than should be expected of a person of his knowledge and experience.
- (b) A director is not bound to give continuous attention to the affairs of the company. It is enough if he attends periodic board meetings. The position is however different if one is an Executive director on salary with the company. S. 2. 282 (4)
- (c) The directors are not guilty of breach of the duty of care and skill if having regard to the exigency of business they delegate their duties to the Managing Director or a Committee of the Board provided there is basis for trusting such officials of the board. Care should however be taken not to delegate duties as may amount to abdication of duties.

3.9. CONFLICT OF INTERESTS

A director shall not place himself in a position where his personal interests will clash with that of the company. Section 280(1) of CAMA. Conflict of interests may arise in the following situations :

1. where the director is utilizing the company's property for his personal benefit outside approved limits S.280(20) (a)
2. Where he utilizes his position to make secret profits out of the company's opportunities. section 280(3).
3. where he misuses company information coming to him by virtue of being a director.

These duties must be observed even after leaving office. S. 280(5)

3.10 LIABILITY OF DIRECTORS

- (a) The directors are liable to account for any secret profits made, unless same had first been disclosed and approved or over looked by the General meeting s. 280(6).
- (b) The liability of directors in the company is unlimited if the memorandum or Articles of Association states, so S. 288(1)
- (c) A director who fraudulently fails to apply money received as loan on behalf of the company for a specific purpose, or money or other consideration as advance to the company for a contract or project, for the specified purpose or contract shall be liable personally for the money S. 290.

3.11. SALARY OF DIRECTORS S. 267

Directors are not entitled to any salaries unless the article of Association so provide, in which case the salary is fixed by the General meeting from time to time. The directors are however entitled to refund for expenses properly incurred in the course of the company's business.

3.12. MEETING OF DIRECTORS

After incorporation, the first meeting of the Directors shall be within 6 months of incorporation. S. 263 (1).CAMA

Decisions at Board meetings shall be by simple majority votes and in case of a tie in votes cast, the chairman shall have a second vote or casting vote s. 263(2) CAMA

The Board shall elect its chairman and fix his tenure. S. 263(4) CAMA.

Unless the articles otherwise provide, the quorum for meetings shall be 2 directors where the directors are not more than 6. If the number is more than 6, then quorum is one third or the nearest whole number to one third. S. 264(1).CAMA.

The board may delegate some or all of its powers to be exercised by the a committee of the board from time to time or appoint one or more of the directors

to the office of managing Director and delegate all or some of its powers to him from time to time. S. 64 and S. 264.CAMA

All directors are entitled as of right to notice of meetings. S.219 & 266(1).

Meetings are called at the instance of any director. S. 263(3)

The managing director is appointed and is removable by the Board. *Yalaju-Amaye V. AREC Ltd* (1990) 4 NWLR (pt 145) 425.

3.13. REGISTER OF DIRECTORS

The company Shall Keep a register of directors and Secretaries at its registered office s. 292(4)

4.0 CONCLUSION

Directors are the Directing mind and will of the Company along with the General meeting. The two are the major organs of the company. The Directors are however responsible for the management of the Company. S. 63 (3) CAMA. The General meeting on the other hand acts as a checkmate to the Board to ensure they function properly.

5.0 TUTOR MARKED ASSIGNMENTS

1. Discuss the different types of Directors known to Law in Nigeria.
2. What are the different legal ways a person may be appointed as director under Nigerian company Law?
3. Discuss the Fiduciary duties of directors under the CAMA.
4. Discuss the scope of Directors duties of care and skill under the CAMA.

UNIT 2 REMOVAL OF DIRECTORS

1.0 INTRODUCTION

The Board of Directors is one of the two principal organs of the Company. Their removal is governed by the CAMA. This unit outlines the circumstances and the procedure for removal of Directors under the CAMA.

The removal of directors is a statutory matter. The CAMA provides for the appointment and removal of directors. It therefore means that any company that wants to remove its directors must adhere to the procedure prescribed by the CAMA.

In the case of, *Bernard Longe v. First Bank of Nigeria Plc*, (2010) All FWLR 252 528 at 310 the Supreme Court clearly stated that directors are persons whose appointment under the CAMA is one with statutory flavor and may be removed only by strict adherence to the procedures prescribed by the CAMA. In that case, Bernard Longe was removed by the Board of Directors as Managing Director of First Bank of Nigeria Plc without complying with section 262 and 266 of the CAMA. The plaintiff lost at the Federal High Court and Court of Appeal, Lagos. He however won at the Supreme Court where the court ordered his reinstatement with full benefits as if he was not removed in the first place. It is therefore very important to adhere strictly with the procedures laid down by the CAMA for the removal of directors.

2.0 OBJECTIVES

1. To show the circumstances under which a director by law may lose his office.
2. To show the procedure for the removal of Directors.

3.0 MAIN CONTENTS

3.1 .DISQUALIFICATION FROM APPOINTMENT, Section 257 (CAMA).

The following persons are disqualified from being appointed as directors under the law.

- (a) Infants i.e. persons under 18 years as at the date of the appointment.
- (b) A lunatic or person of unsound mind
- (c) Insolvent persons (s. 253)CAMA
- (d) Persons convicted of fraud S. 254.CAMA
- (e) A corporate body, except if it chooses a nominee to represent it. (s.257 CAMA).

3.2 VACATION OF OFFICE. S. 258 CAMA

A person already appointed as director shall vacate or lose the office if the following circumstances occur:

- i. He fails, within two months of his appointment to acquire the required number of shares specified for directors in the Articles of Association of the Company
- ii. He becomes bankrupt or reaches an arrangement or compromise with his creditors.
- iii. He is convicted of fraud and thereby restrained by court order from taking part in the management of any company.
- iv. He becomes of unsound mind
- v. He resigns from office in writing to the company.

A person may not have been under the category of persons disqualified from being appointed a director under S. 257 CAMA. However, after being appointed a director and before the expiry of his tenure of office, he becomes caught up with

one or more of those elements that disqualifies a person from becoming a director. In such a case he will be forced by law to resign or be removed from office by court order if he refuses to leave.

It should however be noted that in the case of a lunatic or an insolvent person, they can only be removed from office if it was a court of law that held that they are lunatic or insolvent. Only a court order on the issue is a final conclusion that a person is insolvent or a lunatic.

3.3 REMOVAL FROM OFFICE

Section 41 (3) of CAMA provides that the memorandum or articles of association of a company may empower any person to appoint or remove any director or other officer of the company. Where this is the case, then the director may be removed from office pursuant to section 41 (3).

The person who may remove a director by the power conferred by S. 41(3) shall be a person other than the company itself.

The above is one way by which a director may be removed. The other way is by complying with the procedure in section 262. This procedure will be employed where the company itself wishes to remove its director or when any other person wishes to procure a company resolution to remove a company director. S. 262.

In the case of a life director, though he is appointed for life he may be removed under section 262 by an ordinary resolution of the company's general meeting subject to payment of damages. S262(6) CAMA.

However, he may also be removed by amending the company's articles of association to delete the clause which appointed him a life director. This procedure is however very difficult as it requires three-fourths majority of total votes cast at the meeting. After a successful amendment, the life director stands

removed. In this case there is no damage to be paid to him under section 262 (6) of CAMA since the basis for his claim has been removed i.e. the clause under which he could have claimed breach of his appointment has been removed through the amendment that was made deleting the clause in the articles that appointed him. He can no longer sue under the new articles since they no longer contain the clause for life directorship.

A Company may by ordinary resolution of the General meeting remove a director from office notwithstanding anything in its articles or any agreement with him. Section 262 (1) of CAMA.

This however does not deprive the director so removed from claiming damages for breach of his contract of service where there was a contract between him and the company for a fixed period. Section 262 (6) of CAMA.

A director may be removed in the following manner:

- (a) If there is a procedure specified in the articles or letter of appointment of the Director, especially the Executive Directors, the procedure should be followed i.e. section 41(3) of CAMA if it proves to be shorter or faster.
- (b) If there is no other shorter procedure for removal of directors especially the non-executive directors, the only other procedure is as follows:
 - (i) The persons proposing the removal of a director will issue a special notice to the company containing the proposal for the removal stating reasons. The notice must give at least 28 days before the proposed date of the general meeting where the removal is proposed to take place. Section 236 & 262 (2) of CAMA.
 - (ii) The Company Secretary then sends the notice to the director(s) to be removed requesting his response if any.

- (iii) If the response of the director concerned did not come in too late, the response will be sent out along with the Notice of meeting of the company at least 21 days to the date of the meeting.
- (iv) At the meeting, the director concerned is entitled to make oral representation, and have his written response circulated at the meeting if it was not earlier sent out with the Notice of meeting.
- (v) The resolution to remove the director is then put to vote.

A simple resolution i.e. a simple majority of votes cast is required to remove a director. Section 162 (1) – (3) of CAMA.

The Corporate Affairs Commission is thereafter notified within 14 days of the resolution to remove the director.

3.4. Removal of life director

The procedure for removal of directors also applies to life directors. Section 255 of CAMA defines a life director as one appointed for life. S. 255 and 262 however provides that a life director may be removed by ordinary resolution notwithstanding anything in the articles or in any agreement with him. All directors may be removed from office before the expiry of their tenure. However, such director is entitled to compensation or damages for the unexpired residue of his contract of service as director with the company. If a person is appointed director for a tenure of say 5 yrs and is removed, not due to a breach of his contract of service, say after only 2years .He is entitled to compensation equivalent to the money he could have earned for the balance of 3yrs had he not been removed from office.. Section 262 (6) of CAMA. In the case of a life director removed before his death or voluntary retirement, he shall get compensation equivalent to what the court may assess as the balance of his life expectancy.

If however the articles which made have a life director has been amended to delete the said clause, then the life director will not be entitled to any damages.

3.5. PUBLICATION OF REMOVAL

Once a director has been removed, it is important to notify the Corporate Affairs Commission within 14 days. The company shall also proceed to remove his name from its letterhead papers, receipts, documents in circulation etc. failure to take the above steps might make the company liable for the removed directors' acts. The company will be deemed to hold him out as a director by not taking steps to publicise his removal in all its documents that are in circulation and with the Corporate Affairs Commission. Section 69(b), 250 and 260 of CAMA.

3.6. CONCLUSION

The procedure for removal of directors is statutory and must be followed otherwise the removal will be null and void.

TUTOR MARKED ASSIGNMENT

1. Outlined the statutory procedure for removal of company Directors
2. What are the Circumstances for vacation of office by a Director
3. In what circumstances is a person disqualified from becoming a company director?

UNIT 3: COMPANY SECRETARIES

1.0 Introduction

From the record available of the history of company law as it originated in the U.K., there was no requirement for a company to have a company secretary. The secretary was an inconsequential employee of the company of the status of a mere clerk who did only what he was told to do. However by the 1948 U.K. Companies Act, the status of the company secretary was enhanced. The law required every company to have a company secretary. He was however still left as a mere secretary whose duties were as may be assigned to him by the Board of Directors and the general meeting. He was somewhat a general officer of the company. By the enactment of the repealed 1968 companies Act in Nigeria, the U.K position became applicable in Nigeria. Today however, under the CAMA, as is already the position in the UK, the Secretary is now a statutory officer with statutory duties and an enhanced position. The secretary's qualifications are also clearly stated so also the procedure for his removal.

Clearly therefore, the secretary is now a statutory officer of the company with clearly defined statutory duties.

Section 567 of CAMA defines officers of the company to include persons of the rank of Director, manager or secretary. The secretary is therefore an officer of the company in his own right, with specific duties although additional duties may be assigned to him by the Board of Directors or the General meeting. The Secretary is therefore a Senior of Management Staff of the Company.

A person may be a director and Secretary at the same time but acts required to be done by a director and secretary of a company must be done by two different persons. (Section 294) of CAMA.

2.0 OBJECTIVES

1. To know the status and duties of the Company Secretary
2. to know the qualifications of the Secretary
3. to know the procedure for the secretary's removal.

3.0 MAIN CONTENTS

3.1 Status of the Secretary.

The status of the company secretary is one of both common law and statute law from England down to Nigeria where the secretary graduated from a mere servant to the status of an officer of the company.

The common law position of the secretary was stated by Lord Esher, MR. that “a secretary is a mere servant, his position is that he is to do what he is told and no person can assume that he has any authority to represent anything at all nor can any one assume that statements made by him are necessarily to be accepted as trustworthy without further enquiry”. *Barnett, Hoares & Co. v. South London Tramways Co.* (1887) 18 (QBD 815 at 817).

The Courts in the UK continued to tow the line of the above case to hold that the secretary's authority is “Limited and somewhat of a humble character” per Lord McNaughton in *George White Church Ltd v. Cavanagh* (1902) AC117 at p. 124.

As company law practice developed, so the importance of the company secretary. The courts were forced to change their views about the secretary because company law practice had moved on to upgrade the status of the company secretary. By 1971 in the case of *Panorama Developments (Guilford) Ltd v. Fidelis Furnishing Fabrics Ltd* (1971)2 QB 711), Lord Denning M.R gave judicial recognition to the rising status of a modern company secretary. He stated “But times have changed. A company secretary is a much more important person than he was in 1887. (when *Barnett, Hoares & Co.* case was decided) He is an officer of the company with

extensive duties and responsibilities. This appears not only in modern companies Act, but also by the role which he plays in day to day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day to day running of the company. He is certainly entitled to sign contracts connected with the administrative side and so forth. Such matters now come within the ostensible authority of a company secretary”. (Brakeects supplied) Panorama Development (Guildford) Ltd case, p. 716.

In his concurring judgment, Salmon L.J observed at p. 717 of the law report as follows:

“At the end of the last century, a company secretary still occupied a very humble position, very little higher, if any than a minor clerk. Today, not only has the status of a company secretary been enhanced, but that state of affairs has been recognized by statute”.

The CAMA has also given statutory recognition to the new status of the company secretary.

Section 293 provides that every company shall have a company secretary. Section 295 specifically outlines the statutory qualification of the company secretary. Section 298 outlines his statutory duties while section 296 deals with the procedure for his appointment and removal.

From the above therefore, it is clear that even though the company secretary is appointed by the Board, he is not their servant but that of the company and as an officer of the company he could only be removed by the board in the case of a private company and in the case of a public company, the general meeting must confirm his removal. In either case the procedures prescribed by the law must be complied with to make the removal valid.

In the performance of his statutory duties, he is entitled to resist any interference from the Board or any other officer of the company.

Unless the secretary is also a director, he does not take part in policy formation by the board, but he is the one responsible for the implementation of the Board's decision.

In the exercise of his statutory duties, the company secretary has ostensible authority to bind the company in contracts and the company will be liable.

In *Panorama Developments (Guildford) Ltd* case earlier cited, Denning M.R. held that the secretary had ostensible authority to enter into contracts for hire of cars on behalf of the company in the course of his duties as a company secretary.

This clearly shows the secretary is no more a mere clerk but an officer of the company. In *Okeowo v. Migliore* (1979) 11 SC 138 the Nigerian Supreme Court held that in Nigerian Company Law, the Secretary is a Principal Officer of the Company. In *Wimpey Ltd v. Balogun* (1987) 2 NWLR 322, the Court of Appeal held that the Secretary is indeed a high ranking officer in the company set up and is indeed part of the management. The Secretary is not therefore a mere clerk or typist or Stenographer. He is an Officer of the Company.

3.2 DUTIES OF THE SECRETARY

Section 298(1) of CAMA Statutorily prescribes the duties of the secretary as follows:

- (a) He attends the meetings of the company, the Board of Directors, and their Committees to render all needed Secretarial Services and also advice on compliance with the relevant laws, rules and regulations.
- (b) Keeps the registers and other records required by the CAMA to be kept by the Company.

- (c) Renders proper returns to the Corporate Affairs Commission of activities of the Company as required by law.
- (d) Carries out any other administrative and secretarial duties as may be directed by the directors or the Company.

The above duties of the company secretary may be broken down as follows:

Pre-Meeting Duties

- (a) Consults with the chairman of the Board on the date for the next meeting if not already fixed at the previous meeting.
- (b) Prepares the proposed agenda of the board meeting in consultation with the chairman of the Board including items that may have been sent in by other members for discussion at the meeting.
- (c) Arrange all reports and other documents needed for the meeting.
- (d) Send out relevant notices to those entitled inviting them to the meeting.
- (e) Arrange the venue, refreshment & sitting allowance of members where applicable.

Duties at the Meeting

- (a) Attend the meeting and take up minutes of proceedings
- (b) Advise the meeting on compliance with the law, company regulations etc.

Post Meeting Duties

- (a) Develop the minutes of the meeting for record purposes.
- (b) Inform those concerned on the need to carry out the decisions of the board or the general meeting etc.
- (c) File the necessary information to the Corporate Affairs Commission where required by the CAMA

Apart from the above, the secretary keeps the company's books e.g. register of members, register of charges, books of account, minute books etc.

The secretary is not authorized to perform any function or exercise any power reserved for the Board Except by their authorization, Section 298 (2) of CAMA.

3.3. QUALIFICATION OF THE SECRETARY

The qualification for appointment of the Secretary depends on whether it is a private or public Company.

In a private Company, the Board of directors may appoint any person who appears to them to have the requisite knowledge and experience to perform the functions of the office of Company Secretary.

No Specific qualification is prescribed.

The directors therefore may exercise their discretion. S. 295 of CAMA.

In a public company however, the CAMA has prescribed the qualification for appointment of the Secretary as follows:

- (a) He must be a member of the Institute of Chartered Secretaries and Administrators (ICSA); or
- (b) A legal practitioner; or
- (c) A member of an accounting professional body established by law in Nigeria like ICAN or ANAN.
- (d) A company of chartered accountants, legal practitioners or chartered secretaries and administrators.

4.0 CONCLUSION

The company secretary used to be a mere clerk but today he is an officer of the company. In the case of a public company, he is so important that his qualification is prescribed by law while no qualification is prescribed for appointment as

Director. This shows that the secretary is a very important officer of the Company.

5.0 TUTOR MARKED ASSIGNMENT

1. What is the qualification for appointment of the Secretary of
 - (i) a private company
 - (ii) a public company
2. Discuss the statutory Duties of the Company Secretary

UNIT 4: REMOVAL OF THE SECRETARY

1.0 Introduction

The company secretary is a high-ranking officer of the company. He is regarded as the chief administrative officer of the company. In order to protect the Secretary and ensure that he does his work with confidence, the Law has prescribed the procedure for his removal. This procedure depends on whether he is the Secretary of a private or a public company.

2.0 OBJECTIVES

- (i) To know the legal procedure for the removal of the company Secretary.

3.0 MAIN CONTENTS

3.1 Removal of Secretary of a private Company. S. 296(1)

The Secretary of a private company is appointed by the Board of Directors and is removable by them. What they need is a resolution of the board removing him from office. The company secretary cannot however be

removed by a single director or the managing director or chairman of the board acting alone unless the articles or the board by a resolution delegated the power to them

3.2 Removal of Secretary of Public Company. S. 296(2)

The procedure for the removal of the secretary of a public company is statutorily prescribed. It must be followed to the letter if the intended removal will be valid. The strenuous procedure is to protect the secretary to ensure he does his work without fear of unlawful victimization. The procedure is as follows:

- (a) The Board of directors shall give him a seven working days notice of the intent to remove him. Weekends and public holidays are not counted.
- (b) To notice shall also state the reason for the intent to remove him.
- (c) The notice shall give him the option to resign instead.
- (d) If the Secretary resigns then the process terminates. If he does not resign and does not also make any defence, the Board may remove him and make a report of their action to the next General meeting.
- (e) If the Secretary does not resign but puts forward a defence, the Board shall consider it and if it decides that the defence is not satisfactory, then two options are open.
 - (i) If the allegation against the secretary is one of fraud or serious misconduct, the Board may remove him and make a report of their action to the next General meeting.
 - (ii) If the allegation is not of fraud or serious misconduct, the board may only suspend the secretary and make a report to the next General meeting.

- (iii) The General meeting shall have the final say as to whether the removal will be reversed or ratified and as to when it should take effect.

4.0 CONCLUSION

The Secretary of a public company has a statutory protection and has the opportunity of having the general meeting review his case. The secretary of a public company indeed has a more enhanced status than that of a Private Company.

5.0 TUTOR MARKED ASSIGNMENT

1. Outline the statutory procedure for the removal of the secretary of a public company.

MODULE 3

UNIT 1: NATURE AND TYPES OF MEETINGS

1.0 INTRODUCTION

The members of the Company in General meeting are the other organ of the Company apart from the Board of Directors. The members are an organ of the Company when they function at the general meeting of the Company.

There are three types of General meetings of the company. These are the statutory meeting, the Annual General meeting (AGM) and the Extra Ordinary General Meeting. (EGM).

2.0 OBJECTIVES

1. To understand the three major General Meetings of the Company.
2. To know the situations when a one man meeting could take place.

3.0 MAIN CONTENTS

3.1 STATUTORY MEETINGS s.211.CAMA

This type of meeting is mandatory only for the public company. It must be held within six months of the incorporation of the company.

The meeting is meant to give Directors an opportunity to present the progress report of the company to the members of the company. The progress report is a report which the CAMA requires should contain certain prescribes information.

These include the following:

- (a) The number of shares allotted
- (b) The total amount received in respect of the shares allotted

- (c) Names, addresses and description of the directors, managers, Secretary, Auditor etc.
- (d) Particulars of any pre-incorporation contracts
- (e) Commission paid or to be paid in connection with the issuance of shares.
- (f) Preliminary expenses of the company with the receipts.
- (g) The balance of money at hand to the company's account. Etc.

Members at the meeting are free to discuss the report and take resolutions thereon. S. 211(8) of CAMA.

Before the meeting is convened, a Copy of the progress report referred to as the Statutory Report must be filed with the Corporate Affairs Commission (CAC) forthwith as copies of the report are sent or given to members.

Failure to hold the meeting within the six months of incorporation or failure to deliver the statutory report to the CAC is a ground for compulsory winding up of the Company s. 408 (b) of CAMA.

The Company and any of its officers who is part of the default in holding the meeting as prescribed by law shall be liable to a fine of N50 per each day of default (S. 212 of CAMA).

3.2 ANNUAL GENERAL MEETING (AGM)

Every Company must hold an Annual General Meeting (AGM) in addition to any other meetings it may hold. There should not be more than 15 months between one AGM and the next.

The first AGM must however be held within 18 months of incorporation, thereafter the next AGM will be held within 15 months of each other. The Corporate Affairs Commission (CAC) has power to upon application extend the period within which an

AGM could be held by 3 months. The CAC cannot however extend the period by which the first AGM may be held. (Section 213 of CAMA) If the company fails to hold its AGM as required by Law, the CAC may upon the petition of a member, call or direct the calling of the meeting and give such directions as it deems fit. These directions may include permission for a member to by himself hold the meeting and take decisions that will be binding on the Company. This one man meeting will be deemed to be the general meeting of the company. Section 213 of CAMA).

3.3 EXTRA ORDINARY GENERAL MEETING (EGM)

Extra Ordinary General Meetings as the name implies are general meetings called to deal with emergency or urgent matters that cannot wait for the next AGM

The EGM may be convened by the directors; however, members of the company may also convene one. This is called requisition of meeting.

One or more of the members holding at least one tenth of the paid up share capital of the company, in the case of a Limited liability company or one tenth of the company's voting rights in the case of a company Limited by Guarantee (which has no share Capital) may requisition an EGM.

The requisitionists shall deposit a signed requisition in writing stating the agenda (object) of the meeting at the registered office of the company. The requisition shall be signed by one or more of them requesting the directors to within 21 days of the requisition proceed to convene the meeting. If the directors fail to call the meeting, the requisitionists may proceed to convene the meeting and take decisions which will be binding on the Company.

Expenses incurred in holding the meeting shall be borne by the company and recovered from the directors (Section 215 of CAMA).

3.4 ONE MAN MEETINGS

The general rule regarding meetings is that there has to be two or more persons for a meeting to hold. This principle makes both common and legal sense. A person cannot meet all by himself. He has to be with another person for a meeting to take place. In *SHARP v. DAWES*, (1876)2QB.D26, this assertion was given judicial recognition under the Common Law. In this case, a company meeting was convened but only the secretary Mr. Sharp and another shareholder, Mr. Silversides attended. The meeting nevertheless proceeded to business with Mr. Silversides chairing. The meeting decided that a call be made on all shares that have not been paid for. Mr. Dawes received one of such calls but refused to pay, arguing that there was no valid meeting authorizing the calls to be made.

The Court per Lord Coleridge CJ. held that there was no valid meeting convened, Mr. Silversides being the only shareholder present could not by himself constitute a meeting, the meeting being a shareholders meeting.

The Court in the above case based its decision on the fact that in the ordinary use of the English language, a meeting could not be constituted by one shareholder. However, in *Re London flats Ltd*, (1969)2All ER744, Plowman, J. held that as a general rule, one shareholder could not constitute a meeting except where it could be shown that the word "meeting" had a special meaning and could include a single shareholder.

It is submitted that under the CAMA, Nigeria's principal Companies legislation, the word 'meeting' as it relates to Company meetings admits of special circumstances where one man company meetings could be held.

3.5 ONE MAN MEETING UNDER THE COMMON LAW

As far back as 1911, one man meetings had been recognized by the Courts in England. In *East v. Bennett Bros. Ltd.*, (1911) 1 Ch 163, it was held that one member who held all the shares of a particular class of shareholders could by himself constitute a meeting of that class of shareholders. In this case it was argued and properly too that being the holder of all the preference shares of the company, no other person was affected by the preference shareholder's action and therefore there was no basis for defeating the validity of his one man meeting.

It is respectfully submitted in the same vein that where the quorum for a given Company meeting is fixed by percentage of shareholding the holder of that percentage of shareholding could by himself alone constitute the quorum for the meeting to take place. The reasoning in *East v. Bennett Bros. Ltd* Supra could respectfully apply for example if quorum for a given meeting is fixed at say holders of 60%, if only one member holds the required 60% he constitutes the required quorum to hold the meeting by himself.

3.6. ONE MAN MEETING UNDER THE STATUTE

There are provisions of the CAMA which have the effect of admitting the legality of one man Company meetings as follows:

by court order

(a) Where there is default in holding Annual General Meeting, (AGM) within 15 months of a previous Annual General Meeting and the next, any member of the Company may apply to the Corporate Affairs Commission for directions. These directions "shall include a direction that one member of the company present in person or by proxy may apply to the Court for an Order take decision which shall bind all the members. Section 213(2) CAMA

(b) Where not due to default but due to impracticability, it is not possible to call a meeting of the company or of the Board of Directors, any shareholder or director may apply to the Court for an order to convene and hold the meeting. The Court has power under the CAMA to order that one member in the case of company meetings and one director in the case of board meetings may in person or by proxy hold the meeting and it shall be binding on all the members or the directors as the case may be. S. 223(5) CAMA

(c) Where there is a quorum at the beginning of a meeting but no quorum later to continue the meeting as required by law, due to the deliberate act of some members withdrawing from the meeting to break existing quorum, the Court may order a one man meeting where that is what is necessary if the meeting must hold. S. 232(5) CAMA

(d) Where Board Meetings are unable to hold due to consistent lack of quorum, a board member may apply to Court to hold a board meeting by himself and bind all the other members. CAMA

one man extra ordinary general meetings

Once the Board of Directors of a company receives notice by a member or members of the company for a requisition of an Extra-ordinary General Meeting (EGM) they must within 21 days convene the meeting. If they fail to do so, "the requisitionists or any one or more of them representing more than one half of the total voting rights of all of them may themselves convene the meeting. From the above, it is clear that if only one of the requisitionists holds rights representing more than one half of the total voting rights of all the requisitionists, he may by himself convene the EGM.

one man meeting by proxies

Any member of a company qualified to attend and vote at a meeting of the company shall be entitled to appoint another person, whether a member or not to attend and vote instead of him. It is submitted that since the statute

allows appointment of proxies, a shareholder may attend a company meeting in person or by proxy. A shareholder who receives a proxy therefore attends the meeting for himself and as the representative of the others whose proxies he holds. He therefore has several capacities at the meeting. The shareholder armed with the proxy mandate could validly convene a meeting as if all the others were physically present if he and the proxies he holds constitutes the required quorum.

one man meeting in wholly-owned subsidiaries

A company is a wholly-owned subsidiary where the only shareholders of the company are its parent company and the parent company's other subsidiaries are nominees of the parent company. Where a meeting of the wholly owned subsidiary is called and only the representative of the parent company is present and armed with a proxy mandate from the other subsidiary of the parent company which is itself a nominee of the parent company, a one man meeting could validly take place.

Although the general rule is that one man cannot constitute a meeting all by himself, there are special situations where this may be possible. Under the Common Law this fact had been recognized first in *East v. Bennett Bros. Ltd* (Supra). The courts later acknowledged that where the statute allows the word "meeting" to admit of a special meaning as to include a one man meeting, then the courts could exercise jurisdiction to order for or validate one man meetings.

In *Re El-Sombrero Ltd*(1958)3 All ER 1, the applicant held 90% of the shares of the private company. The two directors of the company held 5% shares each in the company. The applicant desired to sack the directors. All efforts to convene a meeting of the company

failed. Two shareholders are required to form a quorum for a general meeting to hold, so the two directors being the only shareholders besides the applicant never attended any meeting so that there will not be quorum.

The applicant therefore requisitioned a meeting. The other two shareholders as usual refused to attend. The applicant therefore applied for direction to hold a one man meeting as allowed by the section 135 (1) of the 1948 English Companies Act.

The other shareholders/directors opposed the application arguing that one man cannot constitute a meeting.

The court held that since it has become impracticable to hold a meeting, the courts had jurisdiction under the 1948 Companies Act to order for a one man meeting. The Court indeed granted the order.

One man meetings are an exception, they are a weapon in some cases where benefits or rights are deprived because of lack of a valid meeting to approve or exercise the rights or benefits.

The existence of the one man meeting option is also a minority protection as in the El-Sombrero case Supra where the majority uses their number to oppress a numerical minority.

4.0 CONCLUSION

The General meetings of the Company each have its purpose. It is therefore important for the company to observe the holding of these meetings. There are commensurate consequences for not holding the meetings. A good company management will ensure that the meetings are held when due to ensure smooth administration of the company. This is to avoid the unpleasant situation where a minority may go to court to secure an order to hold a one man meeting.

5.0 TUTOR MARKED ASSIGNMENTS

1. Discuss the three General meetings provided for under the CAMA.
2. Under what conditions are one man meetings possible in law?

UNIT 2: NOTICE OF MEETINGS

1.0 INTRODUCTION

A Company usually has several shareholders who are resident in different places. In order to convene a company meeting therefore, the shareholders need to be notified of the meeting together with the agenda thereof to enable them prepare for the meeting.

2.0 OBJECTIVES

1. To help the students know the importance of notice of meetings to those entitled, and the length of such meetings.
2. The contents of a valid Notice of meeting.
3. The consequences of not giving a valid notice of meeting.

3.0 MAIN CONTENTS

3.1. Length of Notice of Meetings

When notice of meeting is to be issued, time must be given to enable the notice reach the persons intended and to enable them prepare and attend the meeting.

Under the CAMA, section 217 provides that the length of notice for all types of general meetings of the company shall be 21 days from the date the notice was sent out, i.e. the 21 days include the date the notice was sent out.

A general meeting may however be called by a shorter notice if:

- a) In the case of an Annual General Meeting (AGM) all the members entitled to attend and vote at the meeting agree.

- b) In the case of any other general meeting if a majority of the members holding at least 95% of the nominal value of the shares carrying a right to attend and vote at the meeting agrees.

In practice, this may not be possible if the company has a large shareholder base. Only a company with a few share holders could be able to contact all the shareholders to get their prior agreement to a shorter notice.

The only circumstance where the requirement of length of notice may not be complied with is when members requisition an extra-ordinary general meeting as outlined under S. 215 (5) of CAMA.

Any notice that does not meet the requirements of length of notice is invalid as no meeting could validly hold without complying with the statutory length of period prescribed by the CAMA.

3.2 Entitlement to Notice of Meeting. Section 219(1) of CAMA.

It is mandatory to serve a Notice of Company General meeting on the following:

- (a) Every member of the company.
- (b) Every person on whom the ownership of a share devolves by reason of his being a legal representative, receiver or a trustee in Bankruptcy of a member of the Company.
- (c) Every director of the Company
- (d) Every Current Auditor of the Company
- (e) The Company Secretary.

3.3 Service of Notice

Notice of meeting may be given to those entitled either personally or by post to the address supplied by the person to the company for sending notices to him.

Notice sent by post must contain the correct address and correct postage stamp. The notice so posted is deemed to be delivered after 7 days of the postage.

In the case of deceased or bankrupt persons, notice of meeting shall continue to be sent to their usual address before their death or bankruptcy until their legal representatives supply a new address if any to the company.

Where several persons hold shares jointly, notice sent to the holder first named in the company's register of members shall be deemed to be notice to all the other joint holders. Section 220(1)-(4) of CAMA.

3.4 Failure to give Notice

Failure to give notice of meeting as required to any one person entitled to receive such notice shall invalidate the entire meeting if held. It does not matter that the person concerned had informed the chairman that he may not attend the meeting. The burden to send out notices is statutory and must be carried out. It is left for the recipient to decide whether or not to attend the meeting. S 218 and S. 221 of CAMA. In *Young v. Ladies Imperial Club Ltd* (1920) 2 KB 523. A meeting of the club was held in which the plaintiff (Young) was not invited. She had told the chairman that she may not attend the meeting, so they did not invite her. The English court of Appeal held that the meeting was invalid for failure to invite Young.

It is doubtful if the court would have made the same finding if Young had sent a notice in writing requesting not to be sent the notice.

However, S. 221 provides that where the failure to send notice is an accidental omission, the meeting shall not be invalid or where the notice was sent but failed to arrive by no fault of the company i.e. if the notice was sent by post to the correct address with the correct postage stamp.

The burden is upon the company to prove that the failure to send the notice is accidental, or that the failure of the notice posted, to reach the person entitled was not due to the negligence of the company.

In *Re West Canadian Collieries Ltd* (1962) Ch 370, there was failure to issue notice of meeting to some members. The company contended that the failure was due to the fact that the printing plates containing the names of the members who were not issued notice were inadvertently kept out of the machine when the envelopes for the notices to the concerned members were being printed. The court was satisfied that the omission was accidental. The meeting was held to be valid.

However, where the failure to give notice of meeting was due to a misinterpretation or misrepresentation of the law or the articles, shall not amount to accidental omission. S. 221 (2) of CAMA. It will amount rather to an error of law which shall not be an excuse.

In *Musselwhite v. C.H. Musselwhite & Sons Ltd* (1962)Ch. 964 the company did not give notice of meeting to certain of its members who had sold their shares but had not been paid and so did not effect a transfer of the shares to the new members. The directors believed that having entered into a contract to sell their shares, they had thereby ceased to be members of the company and so were not invited to the company meeting in question. The court held that the error was one of law and was not an accidental omission. The meeting was consequently invalidated.

3.5 CONTENTS OF NOTICE OF MEETING

The notice of meeting shall contain the place, date and time of the meeting. It shall also specify, the nature of business to be transacted at the meeting in sufficient details to enable members decide whether or not to attend (Section 218(1) of CAMA).

No business may be introduced at the meeting if it was not specified in sufficient details. This therefore rules out the possibility of the popular “Any other Business” that is usually included on the agenda of meetings for the transaction of any other business not earlier included in the agenda. (Section 218(3) of CAMA.) If the business to be transacted is a special business, the resolution proposed must be quoted in the notice of meeting with the terms clearly indicated. (S. 218(1) CAMA)

In *Baillie v. Oriental Telephone Co. Ltd* (1915) 1Ch. 503, Directors of the holding company had also been receiving salaries as directors of a subsidiary company without the knowledge of the shareholders of the holding company. A meeting was called to give approval for the affected directors to retain the extra salaries not earlier disclosed. The notice did not however disclose how much money was involved. The resolution was passed without knowing how much money was being approved. Some shareholders challenged the resolution as invalid for not disclosing the vital details of the business to be transacted in that resolution. The English Court of Appeal held that the resolution was not binding on the company as the notice did not disclose the business to be transacted in substantial details to the share holders.

From the above, it is clear that the consequence of not disclosing the business to be transaction in substantial details to those entitled to attend the meeting will not invalidate the entire meeting but the resolution taken on the resolution with insufficient details.

An error or omission in the notice of meeting with respect to the place, date and time or the nature of business to be transacted shall not invalidate the meeting unless the officer responsible for the error acted in bad faith or failed to exercise due care and diligence. However, if the omission was an accidental error, necessary correction shall be made either before or during the meeting. (Section 218 CAMA).

The notice shall also contain a clause with reasonable prominence advising members of their right to appoint any person as proxy to attend and vote on their behalf if they would be absent. Failure to indicate this fact in the notice of meeting will not invalidate the meeting but every officer who is responsible for the default shall be guilty of an offence and liable to a fine not exceeding N500. Section 218(4) of CAMA.

3.6 VENUE OF MEETINGS

The company's statutory meeting and all AGMs shall be held in Nigeria (S.216 of CAMA). This means the EGM could be held any where in Nigeria or outside.

3.7 COURT ORDERED MEETINGS

Where it is impracticable for any reason to convene a meeting of the company, any member, director or the court of its own motion may by order direct that the meeting be convened. Section 223 of CAMA. *Okeowo v. Migliore* (1979) 11 Sc. 138.

3.8 NATURE OF BUSINESS

Section 214 of CAMA specifies two types of Businesses that may be transacted at the General meeting. They are the Ordinary business and the special business.

Ordinary business includes:

- (a) Declaration of Dividend
- (b) Presentation of financial statements and report of the directors and Auditors.
- (c) Election of Directors to replace those retiring
- (d) Appointment and fixing of the remuneration of the Auditors
- (e) Appointment of the members of the audit committee.

Any business that is not ordinary business is automatically special business. s.214
CAMA

4.0 CONCLUSION

Notice of meetings is very important. It determines the decision of members on whether or not to attend meetings. The procedure of introducing motions under the so called. "A.O.B.". has no place in Company meetings.

Where members do not attend meetings and it becomes in practicable for this or other reasons, for the meeting to hold, the court may order the meeting to be convened even if by only one person. S. 223(2) of CAMA.

TUTOR MARKED ASSIGNMENTS

1. What is the importance of Notice to Company Meetings under the CAMA.
2. Discuss the Legal Consequences of
 - (a) failure to give notice of meeting.
 - (b) Omission or error in the content of the notice of meeting.
3. List the category of persons entitled as of right to receive notice of company meeting?

UNIT 3: PROCEDURE AT MEETINGS

1.0 Introduction

The proper conduct of meetings is important to avoid its legality being challenged. The CAMA has prescribed the general guidelines for the conduct of meetings in terms of the quorum, voting, proxy, adjournment, appointment of chairman por the meeting etc. the Articles too regulate some other aspects that the CAMA does not already prescribes the procedures are statutory in some cases while in other cases

the CAMA allows the company by its articles to regulate how some other things should be done as a complement to the CAMA.

2.0 OBJECTIVES

1. to know the quorum for company meetings
2. appointment chairman for the meetings.
3. the right to proxy
4. How minutes are to be taken and kept
5. Circumstances for adjourning the meeting.

3.0 MAIN CONTENTS

3.1 Quorum

This is the minimum number of persons who must be present at the place, and time of the meeting for the meeting to lawfully commence.

Unless the Articles otherwise provide, quorum must be present at the start and throughout the meeting. S. 232(1) & (2). Unless the Articles otherwise provide, the quorum for meetings shall be one third of the total number of members of the company or 25 members, which ever is less. Where the one third is not a whole number, then the number nearest to one third shall be the quorum. If the members are 6 or less, the quorum shall be 2 members. S. 232 (2) of CAMA.

Note: To arrive at a quorum, members present or their proxies are counted. A company which is a member of another shall be represented by a person appointed by a resolution of the Board of his company. S. 231 of CAMA.

The articles of association of a company should ordinarily provide for what will constitute a quorum in the company. If the articles are silent on the issue, then the quorum provided under S. 232 will apply. Most companies however prefer to adopt the procedure for quorum as provided under S. 232 of CAMA.

Every person who is entitled to a notice of meeting under S. 219 has a right to attend the general meeting of the company. S. 81, 227 & 228 of CAMA.

A person, who is entitled to attend and vote at a meeting, has the right to appoint a representative to attend and vote on his behalf. A representative so appointed is called a proxy. In some cases the proxy means the document issued by the member authorizing someone, whether himself a member of the company or not, to represent him at the meeting. In this case both the document of authorization and the person authorized are called the proxy. (S. 230 of CAMA).

For the purpose of deciding the quorum for a meeting therefore, those entitled to attend the meeting must be presented in person or by a proxy. Counting of the persons present in person or by a proxy will be done physically to be sure there is a quorum. Unless the articles otherwise provide, the meeting cannot start or if it has started, cannot continue if the quorum ceases along the line during the meeting due to the withdrawal of some members in the course of the meeting. Each person present and each proxy document represents one person each, for example, two persons present in person and three proxy documents equals to five persons being present at the meeting. (S. 232 (1) of CAMA).

It may be possible for a shareholder to be a proxy to several persons. In such a case, the shareholder is counted as one person and each proxy he holds is counted as one person each. For example, if Mr. Aondohemba is a shareholder (member) of Aondongu Nig Ltd. Five other shareholders each appoint him to represent them at the meeting, once Mr. Aondohemba appears at the meeting with the five proxies i.e. letter of authority to represent each of the five shareholders, it means six shareholders have appeared for the meeting. If the quorum for the meeting is 6 persons, then with Mr. Aondohemba appearing with the five proxies, a quorum has been formed for the meeting to start. In practical terms however it means only Mr. Aondohemba is physically present.

3.2 CHARIMAN OF THE MEETING

The Chairman of the Board of Directors presides as chairman of the General meetings of the company. If there is no chairman of the Board or he is not present one hour after the time for the meeting, the directors present shall elect one of their members to preside. If no director is present, the members shall appoint one of their members to preside for that meeting only. There is no legal obligation for him to hand over the chairmanship to the board chairman if he eventually surfaces after the meeting has commenced. S. 240 of CAMA.

3.3 PROXY S. 230 OF CAMA

Any person entitled to attend the company meeting, may attend either in person or by proxy. A proxy is any person appointed by the person entitled to attend the meeting as his representative to attend and vote at the meeting on his behalf. The proxy has right at the meeting as the person he represents.

The proxy may be a member of the company or not. The important thing is that the person appointed should have a document showing or evidencing that has the authority of the person he is representing. The document is also called a proxy. S. 230 (1) and (7) of CAMA.

In every notice of meetings nowadays, the company usually indicates on the notice of meeting with reasonable prominence, a statement that a member entitled to attend and vote at the meeting may if unable to attend, appoint in writing a representative called a proxy to attend and vote on his behalf.

Under the CAMA, this is a requirement of the Law. Failure to observe this law will not invalidate the meeting, but every officer of the company responsible for the default shall be liable to a fine of N250 each. S. 230 (2) of CAMA.

In order to make things easy for members, a proxy form in duplicate is usually attached to the notice of meeting sent out to members. If they cannot attend the

meeting, they could just fill out the proxy form indicating the names and particulars of the person they are appointing as proxy. One copy of the form is given to the proxy to present at the meeting in order to be admitted into the meeting. The other is sent direct to the company to the address indicated to arrive at least 48 hours before the meeting, notifying them of the appointment of the proxy. S. 230 (3) and (7) of CAMA.

In some cases, the company may solicit members who may not attend the meeting to appoint some given directors as proxy. Members who may not attend and are also not willing to or do not have the money to spend in sending a proxy may decide to utilize the offer, since members attend company meeting at their own expense.

3.4 VOTING S. 224.

Voting is by show of hands i.e. one man, one vote, unless a poll is demanded before or as the chairman announces the result of the voting by show of hands. The Chairman or at least 3 members present representing at least one tenth of the paid up shares of the company may demand the poll and it is a legal right that cannot be refused except on the issue of the election of the chairman or adjournment of the meeting. (S. 225 of CAMA).

Voting by show of hands does not take care of the wishes of those who have the highest financial stake in the company. However when voting by a poll is made, the voting is by the number of shares a person holds. The articles of association determines how the votes in poll are arrived at. It may be one share one vote or each stock i.e. a bundle or combination of shares worth N1000 each equals one vote i.e. if a company's share is N1.00 each, one needs to gather up to 1000 shares to get one vote, 2000 shares to get two votes and so on.

Voting by a poll is usually demanded by the financial majority when they want to influence a decision in their favour. S. 226 of CAMA.

3.5 MINUTES OF MEETING

The Company Secretary must ensure that a record of the proceedings at the general and all other meetings of the company are kept. This record is called minutes of meeting. Unless the contrary is proved, the minutes of the meeting shall be prima facie evidence of what took place at the meeting. (S.241 of CAMA).

The minutes may be in loose leaves, bound books, retrievable electronic form etc. S. 550 of CAMA.

3.6 ADJOURNMENT /QUORUM OF MEETING.

The meeting may be adjourned by the chairman where at any point in the meeting an adjournment becomes necessary because the members have for good reason left the meeting and the quorum is thereby affected. The meeting may be adjourned to the same place and time by a week and the meeting shall proceed then even if there is no quorum. The meeting will proceed on the quorum of the previous meeting.

If however the reasons for the absence of members are not sufficient, the meeting may continue even if there is no longer quorum by virtue of their leaving the meeting. S. 232(4) 7 (5) of CAMA.

As earlier noted, quorum must be present throughout the meeting. The meeting must end whenever the number of members present no longer meets the quorum. Where members withdraw from a meeting for the purpose of nullifying the quorum and for no justifiable reason and there is no longer quorum to continue the meeting, the meeting may lawfully continue. S. 232 (4) of CAMA.

If however there was a quorum but members later withdraw due to justifiable reasons and there is therefore no more quorum of members present to continue the meeting, the chairman shall adjourn the meeting for one week to hold at the same place and time. If at the next adjourned date there is still no quorum, the members

present will constitute the quorum. If it is only one person present, he may seek court order to hold the meeting alone S. 232 (5) of CAMA. If however he attends with letters of proxy, then he is no longer one man, he may proceed with the meeting.

Where a meeting is called and within one hour of the time fixed for the meeting, no quorum is formed, the meeting shall be adjourned for one week or such other time, date and place as the directors may direct. S. 239 (3) of CAMA.

If at the next adjourned date there is still no quorum, the members present shall be the quorum and if only one person is present he may seek court order to constitute a one man meeting S. 239 (4) of CAMA.

4.0 CONCLUSION

The provisions relating to the conduct of meetings are mostly left for the articles to decide. The provisions of the CAMA are on standby to fill the gap where the articles are silent. Most of the times, the position of the CAMA is adopted by the Company so that they do not have to make separate rules for conduct of meetings. This practice by companies is commendable as it creates uniformity in company practice..

5.0 TUTOR MARKED ASSIGNMENT

1. Write short notes on the following:
 - (a) Quorum
 - (b) Voting
 - (c) Minutes of Meetings
 - (d) Adjournment of Meetings
 - (e) Proxy.

UNIT 4: COMPANY RESOLUTIONS

1.0 Introduction

Decisions at Company Meetings and indeed Board of Directors meetings are taken by voting. The decision of the meeting is called resolutions. There are several types of resolutions depending on the type of company and the type of business being transacted.

2.0 OBJECTIVES

This lesson introduces the students to the different resolutions available in company practice. The students should at the end of the lesson be able to know the following:

- (a) Ordinary Resolutions
- (b) Special Resolutions
- (c) Written Resolutions
- (d) Members resolutions

3.0 MAIN CONTENTS

3.1 Ordinary Resolutions

A resolution is ordinary if it is required by the CAMA to be passed by a simple majority of votes i.e. by the highest votes cast at the meeting. S. 233 (1) of CAMA.

Ordinary resolution is usually taken when the ordinary business of the Company is being transacted. These include:

- (a) Declaration of dividends,
- (b) Presentation of financial statements,
- (c) Report of Auditors on the companies accounts,

- (d) Directors reports,
- (e) The election of directors in place of those retiring,
- (f) The appointment and fixing of remuneration of the Auditors,
- (g) The appointment of members of the audit committee. (S. 214)

There are certain situations in which ordinary resolution shall not be effective unless special notice has been given S. 236 of CAMA provides that where special notice is required of a resolution, such resolution shall not be effective unless 28 days notice was served on the company before the date of the meeting by the proposers or sponsors of the resolution.

This is to enable the company in turn to include the proposed resolution in the notice of meeting to be sent out to those entitled to attend the meeting. Under the CAMA, the following ordinary resolutions require special notice:

- (a) To remove a director from office before the expiry of his tenure of office, or to appoint some one to replace a director that has been removed. S. 262 (2) of CAMA.
- (b) To appoint or re-appoint a person 70 years or above as director in a public company.

3.2 Special Resolution.

Special Resolution requires at least three fourths of the total votes cast, i.e. 75% of the total votes cast must be in favour of the resolution S. 232 (2) of CAMA.

Special resolutions are usually taken in special businesses of the Company. Where the three fourths majority cannot be reached, the resolution is defeated.

All businesses transacted at Annual General Meetings are deemed to be special businesses except the following:

- (a) Declaration of dividends,
- (b) Presentation of financial statements and the report of directors and auditors,

- (c) The election of directors in place of those retiring,
- (d) The appoint and fixing of remuneration of the auditors, the appointment of members of the Audit Committee.

Any other business aside from the above shall be special business requiring special resolution to pass. It would therefore amount to illegality to purport to pass any resolution as ordinary resolution except if it is in respect of the businesses outline above.

All businesses transacted at extra-ordinary general meetings shall be deemed to be special business. S. 215 (8) of CAMA.

The 21 days notice for holding of general meetings must be complied with for any meeting where a special resolution is proposed to be tabled. This provision is mandatory. S. 233 (2) of CAMA.

The only exceptions are:

- (a) Where members holding not less than 95% of the value of shares carrying a right to vote agree to a shorter notice S. 233 (2) CAMA.

Where the meeting is an extra-ordinary general meeting convened by requisition in which the directors refused to co-operate, in such cases, the members may go ahead to hold their meeting and may comply with the rules of meeting as nearly as possible. This means where 21 days notice is not possible or desirable, they are not bound to comply.

3.3 Written Resolutions. S. 234.

In the case of a private company, the CAMA allows it to pass written Resolutions which dispenses with the requirement of law that all resolutions of the General meeting shall be passed at a properly convened

general meeting. A written resolution is one in which the resolution is drafted on paper and signed by all the members of the private company who are entitled to attend and vote had the resolution been taken to a general meeting S. 234 of CAMA.

3.4 Resolutions Requiring Special Notice

There are certain ordinary resolutions which require special notice to be effective.

Section 236 defines a special notice as one in which not less than 28 days notice has been given to the company by the proposers or sponsors of the resolution. This is to ensure that the company has enough time to, in turn include the resolution in the notice of company meeting to be issued to members.

Special notices are required to be given to the company in the following cases:

- a) Where it is proposed to remove a director before the expiry of his tenure of office. S. 262 (2) of CAMA.
- b) Where it is proposed to appoint another directors to replace the one removed. S. 262 (2) of CAMA.
- c) Where it is intended to appoint a person of 70 years or above as director of a public company, or to re-appoint such a person as director. S. 256 of CAMA.

21 days notice is required to convene a general meeting. Those therefore proposing a resolution to remove a director, or to appoint another person to replace a removed director, or to appoint or re-appoint a person who is 70 years or above as director of a public company, must give a minimum of 28 days notice of the proposal to the company. This is to give the company at

least 7 days grace to include the items in the notice of meeting to be sent out.

Usually resolutions proposed at meetings and included in notice of company meetings are the ones proposed by the Board of Directors.

Sometimes, members of the company also want to propose their own resolutions for discussion at the next general meeting. The procedure for such members' resolution is provided for in S. 235 of CAMA.

First, the resolution has to have the support of one or more members having at least one-twentieth or 5% of the total voting rights of all members having a right to vote at the proposed meeting or not less than 100 members with shares worth at least N500 each.

The requisition (proposed resolution) is then sent to the registered office of the company at least 6 weeks before the proposed date of meeting.

The directors are thereafter under obligation to include the proposed resolution for discussion at the next meeting. The item will therefore appear on the notice of the next meeting. If the proposed resolution requires a statement of explanation and it is so indicated in the requisition, the directors shall along with the notice of the meeting circulate the statement. It shall however not be more than 1000 words and a further summary of not more than 1000 words. The statement and summary shall be issued at the company's expense.

The CAMA is however silent as to whether members may circulate their statements to the resolutions beyond 1000 words at their expense. This may however be permissible since the CAMA did not also prohibit such intention.

4.0 CONCLUSION.

Resolutions are important to company meetings. They are the means by which the will of the company is expressed.

5.0 TUTOR MARKED ASSIGNMENT

1. Distinguish between a written resolution and a resolution requiring special notice.
2. Distinguish between a special and an ordinary Resolution.

MODULE 4

UNIT 1: MAJORITY RULE AND MINORITY PROTECTION.

1.0 INTRODUCTION

Upon incorporation, the company becomes a legal person of its own with a personality separate from that of its members. The personality of the company is however run by its human organs, namely the members in general meeting and the board of directors. Only these two organs can act or authorize an act to be done for the company. S. 63 (1) of CAMA

Where a wrong is done to the company, only the company can sue to redress the wrong being that the company upon incorporation is a legal person capable of suing and being sued S. 37 & 38 of CAMA.

The decision to sue to redress a wrong against the company is a management decision for the Board of directors to decide on, being the company organ responsible for management of the company. S. 63 (3) of CAMA.

Where the Board fails to discharge this responsibility, the members in a general meeting may institute legal proceedings in the name of the company. S. 63 (5) (b) of CAMA.

Where the company through its Board of Directors or General meeting does not institute legal proceedings to seek redress for wrong done to the company, no individual could do so. It means the wrong will go unredressed. This is the rule in *FOSS v. Harbottle* (1843) 2H. 416 (also reported as 67 E.R. 189). In this case, The plaintiffs, Foss and Turton were shareholders of the Victoria Park Company which bought land for use as Pleasure Park. Harbottle and others were directors and shareholders in the company. Some of the directors had sold their own lands to the company at inflated prices. The plaintiffs sued to have the directors refund the excess price for exploiting their position to defraud the company. The court held

that the wrong was done against the company and not to the plaintiff in their individual capacity. So they could not sue on behalf of the company without its authorization.

The rule in *Foss v. Harbottle* was again clarified in *MacDougall v. Gardiner* (1875)1 Ch.D 13 where Mollish L.J. stated at P. 25 of the Law report as follows:

If the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority are entitled to do legally, there can be no use having litigation about it. The ultimate end of which is only that a meeting has to be called and then ultimately the majority gets its wishes.

The rule in *Foss v. Harbottle* is also called the majority rule or the proper plaintiff principle. This rule avoids multiplicity of suits by the minority on a matter the majority is willing to overlook.

In Nigeria, the rule in *Foss v. Harbottle*, was first adopted by the Supreme Court in the case of *Abubakar v. Smith* (1973)6 EC 31.

Today the rule has been codified by S. 299 of the CAMA.

The problem with the majority rule is that it allows the majority to get away with several irregularities against the company which directly or indirectly affect the minority but they cannot do any thing about it.

The CAMA has however provided some relief which acts as checks and balances against the excesses of the majority which over the years had increased, resulting

in fraud, oppression of the minority and breach of duties by the directors who are usually also in control as majority share holders.

In order therefore to enforce such likely breaches of director's duties and to protect the minority shareholders, the law has provided remedies. These will be discussed in this unit.

2.0 OBJECTIVES

1. to discover those remedies provided by law to enforce directors duties as well as protect minority shareholders.

3.0 MAIN CONTENT

3.1 The proper plaintiff rule.

“where irregularity has been committed in the course of the Company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct” This was the principle laid down in *Foss V. Harbottle* in 1843. Only the company could sue to redress wrongs to it. The majority comprising the majority shareholders and the Board appointed by them sometimes abuse their office and would not expectedly take any action against themselves. Section 299 of CAMA has now codified this common law principle.

Under the common however before the CAMA was enacted, the courts has taken cognizance of the hardships of the rule in *Foss V. Harbottle* on the minorities. The courts had started introducing some measure of relief under their equitable and inherent powers to reduce the hardship of the rule in *Foss V. Harbottle*. These exceptions have now been codified in the CAMA. They are as follows:

3.2 Members Direct Action. Section 300 of CAMA.

Members of the company have the right to go to court to ask for an injunction or a declaration against the company in the following situations:

- (a) where the company enters into any transaction which is illegal or ultra vires.
- (b) Where the company purports to do by ordinary resolution what by the CAMA or the Articles is required to be done by special resolution.
- (c) Any act of the Company which affects the individual right of the members in the Company.
- (d) Where a fraud is committed against the company or the minority share holders and the directors fail to redress the wrong.
- (e) Where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or the minority shareholders.
- (f) Where the directors are likely to have benefited or have benefited from their negligence or breach of duty. Section 300 (a)-(f)

3.3 Derivative Action S. 303.

A member may apply to the court for an order permitting him to commence a court action in the name of the company or on its behalf or to intervene in an action where the company is already a party for the purpose of taking over the prosecution or defence of the case depending on which side the company is. Section 303(1) of CAMA.

The grounds for obtaining this kind of relief are as follows:

- (a) The wrong doers are the directors who are in control of the company and will not take any action.

- (b) The applicant has given reasonable notice to the directors of his intention to apply for derivative action if the directors do not take the necessary action to redress the wrong.
- (c) The applicant acts in good faith.
- (d) It appears to be in the company's interest that the action be taken. Section 303 (2) (a)-(d) of CAMA.

In Derivative actions, the company bears the cost since the action is in its name or on its behalf unlike in members direct action where the action is taken commenced in the applicant's name and not on behalf of the company. Section 204 (2) (c) & (d) of CAMA.

3.4 Relief from Unfairly Prejudicial and Oppressive Conduct. S. 310 & 311, CAMA

A member may bring an action in court to seek relief where he alleges that the affairs of the company are being run in a manner that is unfairly prejudicial and oppressive to his interest as a minority in the company.

The set of reliefs that could be granted are outlined in section 312(2) of CAMA and includes an order for the winding up of the company, an order setting aside the act constituting the oppression or unfair prejudice e.t.c.

3.5 Investigation by the CAC

The corporate Affairs Commission may on the petition of a member direct an investigation into the Affairs of a company to determine whether the affairs of the company are being properly run. S. 314-330

3.6 Winding up on the Just and Equitable ground S. 408(e) of CAMA

A member may apply to the court for the winding up of the company on the grounds that it is just and equitable to do so. The grounds for this action are not

stated. They are therefore open and will be granted based on the merits of each case.

4.0 CONCLUSION

The CAMA has made out adequate measures to ensure the protection of minorities. Members of the company are therefore empowered to approach the courts for redress. The legal mechanisms for minorities to seek redress are also potent to redress the breach of duties by the Directors. These legal mechanisms operate as legal exceptions to the proper plaintiff rule and operate as a limit to majority rule in the company.

5.0 TUTOR MARKED ASSIGNMENTS.

1. What are the appropriate circumstances for a minority to bring a direct action against the Directors and the company?
2. What is a Derivative action? What are the grounds for the action?
3. List the legal mechanisms available for enforcement of directors' duties and protection of minority interests in the company?

UNIT 2 Profits and Dividends

1.0 INTRODUCTION

Companies limited by shares are set up for profit purposes. People who invest in such companies do so because they expect to get profit on their investments.

The CAMA has laid down rules for declaration of profits and dividends by companies..

2.0 OBJECTIVES

1. to know what profits and dividends is
2. to know the rules for declaration of profits and dividends
3. to know how profits may be capitalized.

3.0 MAIN CONTENTS

3.1 Profit

The CAMA does not define what profit is. S. 380 of CAMA only provides that dividends may be paid out of distributable profits. Distributable profits are stated to be those profits arising from the use of the company's assets (even if it is a wasting asset), revenue reserves and realized profit on a fixed asset sold and where more than one asset is sold, the net realized profit on all the assets sold.

Before a company can declare distributable profits, it must ensure that the company is or would be able to pay its liabilities as they become due. Section 281 of CAMA.

It is clear from the above that distributable profits are those gains which the company has actually received over and above its accumulated losses or liabilities. That is to say, the company must set aside some revenues enough to settle all the liabilities of the company as they become due before it could declare a dividend..

It is only after this that what is left may be paid out as dividends. S.381 of CAMA. What is left as surplus is the net or realized profit. It is this profit that may safely be distributed to share holders as dividend.

3.2 Rules for Declaration of Profit.

A company may declare profits only if they are realized i.e. actual gains in cash or kind received by the company from:

- (a) The use of the company's fixed assets although it is a wasting asset, i.e. fixed assets that are lost or which depreciate in the course of production. S.380 (a) CAMA
- (b) Revenue reserves of previous years. S.380(b) CAMA
- (c) Revenues realized when an asset is sold above the book value i.e. the value of the asset as stated in the company's record. S.380(c)
- (d) There is enough money left to meet all company liabilities as may fall due s.381 CAMA.

Thus it is not binding to make good losses of fixed assets wasted in the course of production provided in the process the company made money over and above the value of its current liabilities. The assets that are lost or wasted in the course of production whose loss need not be made good are raw materials used in production. In *Lee v. Neuchatel Asphalte Co.* (1889)41 Ch. D. 1, the plaintiff brought an action to restrain the company from paying a dividend out of alleged profits. The company was into asphalte mining. It got a mine and dug up the asphalte and declared some profit for the year ended 31st Dec. 1885. It therefore proposed to pay dividend out of the declared profit. The plaintiff contended that the company had not set aside a fund from the profit to represent the mine that depreciated in the course of production. According to them, it amounted to loss of capital if the money used to buy the mine was not set aside from the money profit

realized. They argued that if the value of the mine which was a fixed asset bought with the company's capital was set aside from the money realized, nothing will remain as profit or what may remain of the money realized may not be enough to pay any proposed dividend. The court of Appeal (English) held that where the capital of the company is invested in assets which is of a wasting nature, there was no obligation in law to create a fund out of realized revenue to recoup the wasting nature of the asset provided there would be enough left to pay the company's liabilities after the dividends are paid out.

However, in *Verner v. General Commercial Investment Trust* (1894)2 Ch. 239 the court held that where the income of the company arises out of the turning over (utilization) of circulating capital, no dividend can be paid out unless the circulating capital is recouped.

Under the CAMA, there is also no obligation to make good losses of fixed assets which depreciate in the course of production. The only point is that a company shall not declare or pay dividend if there is any reasonable grounds for believing that the company would, after the payment be unable to pay its liabilities as they become due. S. 381 of CAMA.

S. 567 defines circulating capital as "a portion of the subscribed capital of the company intended to be used by being temporarily parted with and circulated in business in the form of money, goods or other assets and which or the proceeds of which are intended to return to the company with increment and are intended to be used again and again and always return with accretion".

According to the court in *Varner's case supra*, circulating capital must be made good before any profit could be declared.

Revenue reserves. S. 380 (b) of CAMA where a company has kept aside part of its profits of previous years in a reserve account, it may take out of it to distribute as dividends in another year where no profits were made or where not enough profits

was made. Such reserve profit could be carried forward as profit in a later year and declared as divided. S. 383 of CAMA.

3.3 DIVIDENDS

Dividends mean a proportion of the distributed profits of the company which it sets aside for distribution to shareholders as benefits or yields from their investments in the company. The dividends may be fixed annual percentage as in the case of preference shares get, or it may be variable according to the prosperity or other circumstances of the company as in the case with what equity (ordinary) shares get. s. 567 of CAMA.

A dividend is therefore the sum of money which a share holder receives as his own share of the profits of the company set aside for distribution to shareholders depending on the number of shares they hold, or as part of his share of revenue the company receives from the sale of assets which are divisible among the shareholders.

3.4 RULES FOR DECLARATION OF DIVIDENDS

- 1) Dividends are and as approved by the General meeting. The General meeting may decrease the amount recommended by the Board but may not increase the recommended amount section 379(1)-(3) of CAMA
- 2) Dividend may be paid only out of the distributable profits. Section 379(5) of CAMA. Distributable profits are those profits outlined in S.380 of CAMA already discussed.
- 3) Dividends may be paid out only if there are reasonable grounds for believing that the company is, or would be, after the payment able to pay its liabilities as they become due. Section 380 and 381 of CAMA
- 4) Dividends may be paid out of the profits of the current year without first making good the losses of previous years. *Ammonia soda co. Ltd v. chamberlain* (1918) 1 Ch 266 .

- 5) Undistributed profits of previous years kept as reserve may be used to pay dividends. *Dimbula Valley (Ceylon) Co Ltd. V. Laurie* (1961) ch 353.
- 6) Dividends must not be paid out of the company's capital. The capital must always be maintained. In *Flicropts'* case (1882) 21 Ch. D519 It was held as a fundamental principle of company law that a company's subscribed (issued) share capital must be maintained. Where any part of it is lost in the course of business, it must be recouped in any subsequent profits before dividends are paid. The only exception is where the court or the law permits such payment out of capital i.e. without first making good a previous loss as in *Lee v. Neuchatel Ashalte Co. Supra.* (earlier cited).

Directors who are knowingly parties to the payment of dividends out of capital are jointly and severally liable to indemnify the company to the value of such dividend pay out.

The company's paid up capital must be kept as a guarantee to creditors that there will always be money available to pay up the company's debts. Thus the company's capital is not available for use as dividend payment to shareholders. S. 386 (1) CAMA

However the directors have a right to recover dividends paid out of capital to shareholders who knew that the dividend paid to them was taken out of the company's capital s. 386 (2) CAMA

Where employees under their contract of service are entitled to a share in the profits of the company, they may claim the share whether or not dividends have been declared provided profit was made. s. 384 CAMA

- 7) Dividends may be paid out of profits without first making good a loss or depreciation in fixed assets but loss or depreciation in circulating assets must first be recovered. S. 567 of CAMA defines circulating Assets or capital as the portion of the subscribed (share) capital of the company

intended to be used by being temporarily, parted with and circulated in business in the form of money, goods and other assets and which, or the proceeds of which are intended to return to the company with increment (profit) and are intended to be used again and again and to always return with some accretion.

Under S. 379 (5) (c) of CAMA, a company cannot pay dividends out of the appreciation in value of its capital assets (Fixed assets) i.e. where experts value a company's fixed assets like its a building and value it far above its actual cost when it was built, the revaluation will reveal an increase which could be viewed as profit after the actual cost has been deducted. If the asset is not sold, the increase in value is an unrealised profit. It cannot be used to pay cash dividends. This unrealized value can however be applied to write off previous losses or where there are no losses, it could be used to issue bonus shares, as fully paid shares to shareholders.

However, where the asset is sold and money realised, the increased. Value of the asset over the actual cost becomes realized profit and may be used in paying dividends provided no previous losses are pending. *Ammonia Soda Co. v. Chamberlain Supra.*

3.5 RESERVATION OR CAPITALISATION OF PROFITS

Companies may make much profits and may not distribute all to the shareholders but save some part of it in a reserve account. This sum could be useful in future. Section 383 of CAMA allows this practice. It provides that the directors may set aside out of the profits of the company such sums as they think fit as reserve which will at the discretion of the directors be applicable for any purpose to which the profits of the company may be applied.

The General Meeting may however on the recommendation of the Board of Directors Capitalise any part of the reserved profits. Usually, to justify the capitalization of the reserve, the General meeting may set free such sums for

distribution to shareholders but the sum will not be paid to them in cash but in kind by:

- a. either paying up any unpaid shares held by the members; or
- b. by paying up some unissued shares of the company and allotting them to the members as fully paid up. section 383(2)-(4) of CAMA

Dividends once approved by the general meeting are paid per share. For example, if dividend is declared at a rate of N1.00 per ordinary share, a person who hold 1000 shares gets N1,000.

The dividends are issued by way of a warrant which is a kind of a cheque. It cannot be cashed over the counter at the bank. It can only be paid into the shareholder's current account.

Where however the shareholder has indicated that the money be credited direct to a given current account of the shareholder. It shall so be paid

Once a dividend is declared, it becomes a debt against the company and is recoverable within 12 years s. 385 of CAMA.

3.6. Unclaimed dividends

Where dividends are returned as unclaimed, the company shall send a list of the persons who did not claim their dividends with the notice of meeting of the next annual general meeting. After 3 months of this notice, the company may invest any unclaimed dividend for its benefit in an investment outside the company. The dividend however remains payable on demand for 12 years as earlier stated.

Where however a dividend warrant did not reach a shareholder due to the fault of the company, it shall attract interest at the current bank rate from 3 months after the date on which it ought to have been posted to him. s. 382 of CAMA.

4.0 CONCLUSION

The law has provided the rules for determining what amounts to profits and dividends to ensure that the capital of the company is not dissipated in the name of profit sharing. These rules are mostly common law rules which have now been codified by the CAMA.

5.0 TUTOR MARKED ASSIGNMENT

- 1) Outline the rules for the determination of profits under the CAMA
- 2) What is a distributable profit and how is this arrived at?
- 3) What is a dividend? How are dividends arrived at?

UNIT 3. FINANCIAL STATEMENTS

1.0. INTRODUCTION

Financial Statements are a very important part of a company's existence. They are its certificate of health or otherwise. For the members, it enables them know whether their company is doing well or not. This will help them decide whether to withdraw their investment in the company or not. For third parties, it provides information that will help the potential investor decide whether the company is viable or not. A clean and healthy financial statement is one of the most important documents that are used in judging the health of companies.

2.0. OBJECTIVES

At the end of this lesson, the student should be able :

1. to understand the obligation of companies in respect of keeping accounting records
2. to understand the content of directors report that accompanies the company's financial reports
3. to understand the obligation of publishing the financial reports and the delivery of same to the Corporate Affairs Commission.
4. to know the contents of the annual returns required of companies in Nigeria.

3.0 MAIN CONTENTS

3.1 Accounting Records

Every company shall cause accounting records of its financial transactions to be kept. This record shall disclose with reasonable

accuracy at any time the financial position of the company. In particular, the records must contain entries from day to day of all sums of money received and expended by the company and the assets and liabilities of the company. Section 331 (1)-(3) of CAMA. If the business of the Company involves dealings in goods, the accounting records must contain the following:

- a) statement of stocks held by the company at the end of each financial year,
- b) all statements of goods sold and purchased and their buyers and sellers in sufficient details to enable them to be identified s. 331(4) of CAMA,
- c) the accounting records must reflect a true and fair view of the company's financial position. s. 335(1) & (2) of CAMA.

The accounting records of each year are to be preserved for 6 years before they may be destroyed. They are to be kept at the company's registered office or such other place in Nigeria as the directors think fit. Section 332 (1) & (2) of CAMA.

The directors shall cause the annual accounts of the company to be prepared for audit and presentation to the Annual General Meeting (AGM) S. 334(1) 345 and S. 214 of CAMA.

The financial records must reflect the financial position of the Company not exceeding at least 9 months before the next meeting. S. 35(1) of CAMA.

3.2 Directors' Report

The directors shall in respect of each financial year prepare a report showing:

- (a) a fair view of the development of the Company and its subsidiaries (if any) during the financial year in question.
- (b) The amount if any which they recommend should be paid as dividend and the amount they propose to carry to reserves if any (S.342 (1) and 379 of CAMA.

The financial statement contained in the director's report shall be sent to every member of the company and every debenture holder, etc. s. 344 of CAMA.

The Directors report must be prepared in every financial year and laid before the AGM.

3.3 Publication of financial Reports

Every public Company is required to publish its financial statements together with the auditors report. S. 254 & 355 of CAMA.

3.4. Duty to prepare financial statements

Section 334 of CAMA places the duty to prepare financial statements on the board of directors. These financial statements must be prepared annually. The financial statements must include the following:

- a) Statement of the companies accounting policies
- b) The balance sheet as at the last day of the financial year in question (the current year)
- c) The profit and loss account for the current year
- d) Notes on the account by the directors/auditors
- e) The auditors report

- f) The directors' report
- g) A statement of the sources of funds of the company and its application
- h) A value added statement for the financial year
- i) A five year financial summary
- j) The group financial statement (if the company is a group or holding company).

Private companies are however exempted from items (a), (g), (h) and (i) above. Section 334 (3) of CAMA.

Note: s. 335 of CAMA provides the following explanations:

The statement of the company's financial statement is intended to reveal whether the company complied with the accounting standards laid down by the Nigerian Accounting Standards Board. S. 335 (1) CAMA.

The balance sheet shows a true and fair view of the financial state of the company generally. The profit and loss account concentrates on showing whether the company made any profits or loss in the financial year. It is in this account that it will be clear if the company complied with the rules for declaration of profits and dividends or not.. S. 335 (2) CAMA..

Value added statement is intended to show the wealth created by the company and how the different stake holders benefitted i.e. shareholders, creditors, employees, the government etc. S. 335(4)

The five year financial summary is for comparison to see how the company has fared so far in the past 5 years. S. 335 (5)

Notes to the account means any explanation provided in the account to explain certain things that could lead to misinterpretation if the notes are not supplied. Section 335(7)- (9) of CAMA.

3.5. Group or Holding Companies

S. 334 (2) (j) of CAMA provides that the annual financial account or statement must include the group financial statement if the company is a group or holding company.

The group financial statement means, apart from the individual statements of account that each company within the group lays before its annual general meeting, the parent company of the group of companies must prepare financial statements that reveal the financial state of the group as a whole. S. 336 of CAMA.

A company is a holding or group company if it either controls the composition of the board of directors or holds more than one half of the shares of another company. These other companies being controlled are called the subsidiaries of the holding company. S. 338 of CAMA.

A company which is a subsidiary of another subsidiary is regarded as a subsidiary of the company that controls the group. For example, Co. A owns Co. B. company B. own Company C., Company C will be regarded also as a subsidiary of company A.

The directors report which is required to accompany the financial statements deals with such issues as the amount of profit or loss made, the dividend recommended and the reason or basis for the recommendation, the value of the company and its subsidiaries, the future of the company, donations made by the company and particulars of the recipients, the

employment policy of the company especially towards the disabled, employee safety and training etc. S. 342 CAMA..

The auditors' report is to provide independent confirmation of the accuracy and reliability of the company's financial statement. s. 359 of CAMA.

3.6. Annual Returns

Every Company shall make and deliver to the CAC every year an Annual return giving account in summary of the company's activities in the year in question. The Annual return is forwarded to the CAC within 42 days after the company's AGM where its financial statements were considered. Section 270 & 374 of CAMA.

3.7. Contents of Annual Returns.

The Annual returns to the CAC shall contain the following information:

- (a) Address of the Company's Registered Office.
- (b) Summary of register of members and that of debenture holders.
- (c) Summary of the share Capital and debentures and of the Company's Indebtedness.
- (d) List of past and present members
- (e) Particulars of the Directors and Secretary. S. 371(1) of CAMA.

The Annual returns shall be accompanied by:

- (a) a copy of the current balance sheet and profit and loss account that was laid at the last AGM. The copies shall be certified as true copies by a director and the secretary of the Company.
- (b) A copy of the external Auditors report and that of the directors of the company's financial situation presented at the last AGM, certified to be a true copy by the director and the secretary.

4.0 CONCLUSION

The preparation and submission of financial reports is mandatory for every company whether private or public. Through these reports the CAC is able to monitor the financial state of companies registered by it.

As for the public companies, the requirement that they publish their financial statement is very important to the investing public who may thereby decide whether to continue to invest in the company or not.

5.0 TUTOR MARKED ASSIGNMENTS

1. Discuss the components of an annual return under the CAMA
2. Discuss the contents of the directors financial report.

UNIT 4: FINANCIAL AUDIT

1.0 INTRODUCTION

Financial statements of the Company are prepared by the company's staff. The need for an independent confirmation of the true and fair value of the financial statement gives rise to the need for External Auditors to check the financial statement prepared by the company and issue a verification statement to that effect.

2.0 OBJECTIVITES

At the end of this lesson, the student should be able :

1. To discuss the appointment of Auditors and their qualification.
2. The liability of Auditors
3. The removal of Auditors
4. The functions of the Audit committee.

3.0 MAIN CONTENTS

3.1. Appointment of Auditors

Every company must at its AGM appoint an auditor(s) to audit its financial statements. Section 357 of CAMA.

The first Auditors are appointed by the Board of Directors and they hold office until the next AGM where the AGM will appoint the next and subsequent set of auditors.

A retiring auditor is deemed re-appointed unless.

- (a) He ceases to be qualified to be an auditor to the company, or
- (b) A resolution is made appointing another person as auditor, or
- (c) A resolution is passed refusing to re-appoint him, or
- (d) He has given the Company notice in writing resigning his appointment. Section 357(1) & (2) (a) – (c) of CAMA. If at any AGM, a retiring auditor is not re-elected and no person is appointed auditor, the Board of Directors shall fill the vacancy until the next AGM. Section 357(3) of CAMA.

3.2 Qualification for Appointment as external auditor..

To be appointed an auditor, a person shall be a chartered Accountant Section 358 (1) of CAMA.

The following are however disqualified from appointment

- (a) an officer or servant of the company
- (b) a person who is a partner or in the employment of an officer or servant of the Company.
- (c) A body Corporate. Section 358(2)(a)-(d) of CAMA.

3.3 Auditors Report

The auditors shall examine the financial statements of the company presented to them. They shall make a report on the accounts examined by them i.e. the balance sheet, the profit and Loss account and on all group financial statements (if any). The auditors report will be presented at the AGM where the directors will also present the company's financial statements. Section 359(1) of CAMA.

3.4 DUTIES OF AUDITORS. S. 360 of CAMA

The duties of auditors have been the subject of judicial comments over the years. In *Re London and General Bank (No. 2)* (1895)2 Ch 673 Lindley L.J. summed up the duties of an auditor, inter alia, as follows:

“His business is to ascertain and state the true financial position of the company at the time of the audit...but he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company’s true position. He must take reasonable care to ascertain that they do so. An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company’s affairs; he does not even guarantee that the balance sheet is accurate according to the books of the company. If he did, he would be deceived without any want of reasonable care on his part, say, by fraudulent concealment of a book from him...he must be honest, i.e. he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true.”

The primary duty of the auditor is to examine and investigate the company’s financial books presented to him to enable him form a professional view as to the following.

- (a) Whether proper accounting records have been kept
- (b) Whether the company’s balance sheet and its profits and loss account are in agreement with the accounting records.
- (c) The auditor shall thereafter make a statement of their findings to the AGM. Their report will form part of the financial report of the company for that year.

3.5 LIABILITY OF AUDITORS

An auditor owes fiduciary duties of loyalty and good faith towards the company. He is required to exercise due care, diligence and skill as is reasonably expected of him.

Where a company suffers loss or damage as a result of failure of the auditor to discharge his duties faithfully, He shall be liable for negligence.

If the directors fail to sue him to seek redress, a member may do so after giving the directors 30 days notice of his intention to do so. Section 368 (2) & (3) of CAMA.

3.6 VACATION OF OFFICE

An auditor may vacate office in the following ways:

- (a) By resignation.

The auditor may resign in writing to the company at its registered office. Section 365(1) of CAMA. The notice must contain a statement that there are no circumstances connected with his resignation which he considers should be brought to the notice of the company. If there are any such circumstances, he must state so. Section 365(2) of CAMA.

- (b) An auditor may also be removed from office. A special notice is given for the removal of the Auditor. At the AGM, an ordinary resolution is passed to remove him. Section 362(1) & 364(1) (d) of CAMA.

Once an auditor is removed from office before the expiry of his tenure, a return must be made to the CAC within 14 days of passing the resolution to remove him. Section 362 (2) of CAMA.

3.7 Audit Committee

In addition to the work of the auditors, the CAMA has provided for the setting up of an Audit Committee. Section 359 (3) of CAMA. This requirement is in respect of Public Companies only. The Audit committee is made up of equal number of directors and representatives of the shareholders. Subject to a maximum of six members. Section 359(4) of CAMA.

3.8. Objectives of the Audit Committee

The audit Committee has the following objectives:

- (a) to examine the auditors report and make recommendations thereon. S.359(4) of CAMA.
- (b) Ascertain whether the accounting and reporting policies of the company are in accordance with legal requirements, and agreed ethical practices.
- (c) Review the scope and planning of audit requirements.
- (d) Keep under review the effectiveness of the company's system of accounting and internal control.
- (e) Make recommendations to the Board with regards to the appointment, removal and remuneration of external auditors of the company.
- (f) Authorize the internal auditor to carry out investigations into any activities of the company which may be of interest or concern to the committee. Section 359(6) of CAMA.

4.0 CONCLUSION

The practice of appointing professional external auditors to verify company financial statements is a good development. This is particularly true of public companies. The auditor's report goes to give the investors more confidence in the companies financial records. However, while the company may sue the auditor for negligence of duty if found to be in breach of his duties, the CAMA is silent as to whether 3rd parties may also sue the external auditors. This is very important because the auditors report is not only for the company's good but for the good of its current investors and prospective investors.. They rely on its published financial records to decide whether or not to keep their investment in the company or whether or not to invest in the company as the case may be.

5.0 TUTOR MARKED ASSIGNMENTS

1. What are the qualifications of an auditor and how may he leave office?
2. Discuss the duties of an Auditor and distinguish them from those of the Audit Committee.

MODULE 5. BUSINESS RECONSTRUCTIONS

UNIT 1. ARRANGEMENTS AND COMPROMISE.

1.0 Introduction

A business organization may be reconstructed in various ways to make it more productive or to help it come out of some financial difficulty that threatens its existence.

Reconstruction may take several ways such as arrangement and compromise, Amalgamation or mergers, then takeovers.

Arrangement and compromise is situation where creditors or shareholders alter their rights in the company that is deep in debt to give it some reprieve instead of allowing it to go under i.e. wind up.

2.0 Objectives

This lesson is intended :

- (a) to make known to students what arrangements and compromise is all about.
- (b) to help students know the procedure for arrangements and compromise

3.0 MAIN CONTENT

3.1 Definition

An arrangement and compromise is any change in the rights or liabilities of members, debenture holders or creditors of a company or class of them or in the regulation of a company other than a change effected under any other provision of this Act or by the unanimous agreement of all parties affected section 537 of CAMA.

Thus, were all the parties agree to a reconstruction, there is no need for a scheme of arrangement. A scheme of arrangement will arise where some of the members or creditors do not agree to an arrangement. This will therefore necessitate a scheme of arrangement that will bring a compromise between the opposing groups.

A compromise therefore is a situation where the creditors of a company or a majority of them agree to collect from the company a sum less than what is due them as full and final discharge of the company's debts.

And arrangement on the other hand is a situation where some shareholders do not agree to give up their rights in the company and a scheme is arranged that will accommodate the dissenting shareholders in the reconstruction sought to be made. The CAMA provides for two types of arrangements.

3.2 ARRANGEMENTS WITH MEMBERS ON SALE OF COMPANY PROPERTY IN VOLUNTARY WINDING-UP

A company may resolve by a special resolution that their company to be put into members voluntary winding up and the liquidator appointed be instructed to sell off the company's assets to the acquiring company in consideration of fully paid up shares, or debentures in the acquiring company. This will be issued by the acquiring company in place of what they could have gotten had their company been sold in cash. Section 538(1) of CAMA.

The shares of dissenting shareholders by special arrangement shall be bought at a price agreed between them and the liquidator. The Securities and Exchange Commission must however approve of the price at which the dissenting shares are being bought. Section 538(4) of CAMA.

3.3 COMPROMISE ARRANGEMENT WITH CREDITORS

Where a company wishes to make an arrangement that will secure a compromise of its liabilities by its creditors, it could prepare a scheme of compromise and approach the court for an order that a meeting of the creditors be called as the court may direct to be called. Section 539(1) of CAMA.

The scheme will show the effect of it on the right of creditors and what they stand to benefit or lose if they do not agree to the scheme. If the court grants the application, the meeting will be called by adverts in the Newspaper and notice to all concerned with a copy of the scheme.

If the meeting approves the scheme, the court will be approached again to sanction it. Thereafter it becomes binding on the creditors. A copy of the court order and the scheme agreed on will be delivered to the CAC for registration before it become enforceable. Section 539 (4) of CAMA

4.0 CONCLUSION

Arrangements and compromise are part of the provisions of the CAMA to provide alternative procedures to help an ailing company to find a lease of scheme which enables the creditors to agree to compromise their rights in order to help the company to have some breathing space.

Arrangements concern the members. It is a scheme which enables members to compromise their rights to allow their company metamorphose into a better company.

5.0 TUTOR MARKED ASSIGNMENT

Discuss the procedure and significance of Arrangements and compromise to corporate reconstruction under the CAMA.

UNIT 2: MERGERS

1.0 INTRODUCTION

Mergers are another type of corporate reconstruction device. Mergers, like takeovers and Arrangements and compromises provide alternatives to outright winding up of companies.

Mergers are regulated by the Investments and Securities Act (ISA) 2007.

2.0 OBJECTIVES

This lesson will help the students:

- (a) to know what mergers means
- (b) to know the procedures for mergers

3.0 MAIN CONTENT

3.1 DEFINITION

A merger is any amalgamation of the undertakings of any part of the undertaking or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies' corporate section. S.119, ISA 2007.

3.2 Types of mergers

- (a) Vertical Mergers. This is when two companies involved in different levels of production in the same industry merge.
- (b) Horizontal Mergers. This is when two companies in the same level of production merge to eliminate competition

(c) Conglomerate Mergers. This is when two or more companies in different or unrelated business merge.

3.3 PROCEDURE FOR MERGERS.

3.1 Pre-merger stage

(i) The merger proposal is prepared, considered and approved by the boards of the merging companies.

(ii) A pre-merger notice is given to the members of each company and the Securities and Exchange Commission (SEC)

(iii) Any of the merging companies will then make an application to the Federal High Court to approve the merger

(iv) If the court approves it, the general meeting of each of the merging companies is called separately to consider the merger documents.

3.2 The consolidation stage

(i) If the special majority of three fourth of members of each of the merging companies voting in person or by proxy approve the merger, it is then referred to SEC for approval.

(ii) If SEC approves the scheme, any of the two companies will again apply to the Federal High Court for final approval.

3.3 Merger Stage.

(i) The merging companies shall cause a copy of the court order giving final approval to be delivered to SEC for registration within 7 days of the order.

(ii) A notice is published in the Federal Government Gazette and in at least one News Paper.

(iii) Thereafter SEC is notified of the completion of the merger.

Note: The above procedure is provided for in the SEC rules and Section 119-130 of ISA 2007.

4.0 CONCLUSION

Mergers are regulated because they have the potential of creating monopolies. It may also provide an opportunity to oppress the minority by forcing them to accept an unfair deal. The courts are involved to create fair hearing and provide additional supervision to that of SEC to ensure a fair deal.

5.0 TUTOR – MARKED ASSIGNMENTS

1. Discuss the procedure for mergers under the ISA 2007.
2. Discuss the different types of Mergers recognized in the capital market.

UNIT 3: TAKEOVERS

1.0 INTRODUCTION

Takeovers are another type of Business reconstruction. This process is however an aggressive way of takeover of the management or substantial voting rights in a target company. It is aimed at acquiring control in a desired company.

2.0 Objectives

This lesson is intended:

1. to define a takeover
2. to know the procedure for takeovers.

3.0 MAIN CONTENTS.

3.1 Definition of takeover.

Section 131 of ISA 2007 explains what amounts to a take over as follows :

- (a) Where a person acquires shares whether by a series of transactions (purchase) over a period of time or not, which taken together with shares already held or acquired by persons acting in concert with other persons carry 30 percent or more of the voting rights of the company; or
- (b) Together with persons acting in concert, a person holds not less than 30 percent but not more than 50 percent of the voting right and such person or any person acting in concert with him acquires additional shares which increases his percentage of the voting rights and such such a person makes a takeover offer to the holder of any class of the equity share capital in which such a person or any person acting in concert with him holds.

3.2 Procedure for takeovers

- (1) A bid is prepared to the Board of the Offeree Company which meets to consider it
- (2) An application is thereafter made to SEC for approval to proceed with the bid
- (3) If approval is given, it shall be in force for 3 months subject to further extension.
- (4) If SEC refuses to give approval, the Offeror may seek judicial intervention
- (5) If approval is given, the takeover bid is dispatched to the shareholders of the target company and the directors and SEC.

Takeover bids are not allowed in private companies.

- (6) If approved the Offeror shall take up the shares deposited or indicated for the takeover by the shareholders of the target company.

The shares of dissenting shareholders shall be taken over at fair value by the offeror at the agreed price subject to SEC approval. Section 131 to 151 of ISA 2007.

4.0 Conclusion.

Takeovers are an aggressive and deliberate effort to acquire control of another company. Unless one has much money, takeover is a very hard task. However takeovers that promote monopolies are not healthy.

5.0 Tutor – Marked Assignments

1. Discuss the procedure for takeovers under the ISA 2007.

2. What is a takeover process? Discuss.

UNIT 4. DEFUNCT COMPANIES.

1.0 INTRODUCTION.

Defunct companies are companies that are not functioning based on the record of the CAC. A lot of people incorporate companies but keep the certificate in their brief cases waiting for the rainy day when they may use them to do business. For some, this day never comes hence the company continues to exist without functioning. The CAC usually strikes off the names of such companies from its list, and treats them as non-existent.

2.0 OBJECTIVES

At the end of this lesson, the student should be able :

- (a) to know the conditions for declaration of a company as being defunct
- (b) to know the consequences of being declared defunct.
- (c) how a defunct company could be restored.

3.0 Main contents.

3.1 Defunct companies S. 525(1) of CAMA

Defunct companies are those companies that the CAC has reasonable cause to believe are not carrying on business.

3.2 Condition for declaration of being defunct.

Whenever the CAC has reasonable cause to believe that a company is not carrying on business, it shall send to the company at its registered office, a

letter by post inquiring whether the company is carrying on business (section 525(1) of CAMA.

Companies are required to file yearly, their annual returns which show they are carrying on business.

The CAC will have reasonable cause to believe a company is not carrying on business if it does not see the company filing its annual returns for some years.

3.3 Procedure for declaration of being defunct

- (a) The letter of inquiry is dispatched to the suspected company at the address it filed as its registered office address at the point of incorporation. If the CAC does not receive a reply within one month, it shall send another letter by registered post within 14 days of the expiring of the initial one month notice, referring to the first letter and stating that no reply thereto has been received.

It shall further warn that if no reply is received to the second letter within one month from the date thereof, notice shall be published in the federal government Gazette with a view to striking off the name of the company from the register of companies.

- (c) If the CAC receives reply that the company is not carrying on business or receives no reply at all within one month of the second letter, it shall cause notice to be placed in the federal government Gazette and a copy thereof sent to the company that at the expiration of 3 months from the date of the notice, unless cause is shown to the contrary its name shall be struck off the register of companies in Nigeria. If no good cause is shown at the end of the 3 months, the

CAC shall be at liberty to strike off the name of the suspected company from the register of companies.

3.4 Consequence of declaration of being defunct.

(a) If the name of a company is struck off the register of companies upon a declaration of being defunct the company shall be dissolved. Section 252 (1)-(3) of CAMA

(b) The CAC may however before dissolution decide to place the company under winding up. Section 525 (5) (b) of CAMA

3.5 Restoration of Defunct Companies

Any member, creditor or the company who feels aggrieved by the striking off of the name of the company may apply to the court at any time before the expiry of 20 years from the publication of notice declaring the company to be defunct for the restoration of its name.

The court if satisfied that the striking off was done in error, or that it is just to restore the name of the company may so order. Section 525 (6) of CAMA

4.0 CONCLUSION

The procedure for declaration of a company as defunct is very detailed. It is made to ensure that ample opportunity is given to enable the company adjust and commence business if it actually had not.

When a defunct company is dissolved, its assets are forfeited to the state, unless if the CAC had exercised its discretion to wind up the company. Section 525 (5) (b) and S. 526 of CAMA.

The company has 20 years within which it may seek court order restoring its name. it is doubtful if this will be possible. It is better to incorporate another company in the circumstance.

5.0 TUTOR MARKED ASSIGNMENT

1. Discuss the procedure for declaration of being defunct.
2. What is a declaration of being defunct and what is the consequence thereof?

MODULE 6

UNIT 1 WINDING UP BY THE COURT

1.0 INTRODUCTION

The existence of a company may be brought to an end as provided for under the CAMA.

Winding up is the process by which a company's existence is terminated i.e. liquidated and subsequently dissolved and its assets sold off for the settlement of its creditors, members and employees. The life of the company does not come to an end at the commencement of winding up proceedings. It is only the beginning of the end for the company. Its life actually comes to an end when the winding up processes are completed and the company is dissolved.

There are three modes of winding up, winding up by court order (called compulsory winding up, voluntary winding up and winding up subject to court order.

In this unit, winding up by court order will be considered.

2.0 OBJECTIVES

1. to know the grounds under which the court may wind up a company.
2. to know those entitled to apply for the court order
3. to know the consequences of a winding up order.

3.0 MAIN CONTENTS

3.1 Jurisdiction to Wind up A Company

The Federal High Court situate in the area where the registered office of the company has been for the last 6 months preceding the presentation of the petition to wind up the company shall be the place for the presentation of the winding up petition.. Section 251 (1) (e) of the 1999 constitution as amended also confers exclusive jurisdiction to wind up a company on the Federal High Court.

3.2 Grounds for Winding Up

Section 408 of CAMA outlines the legal grounds for the presentation of a petition for winding up as follows:

- (a) Where the company has by special resolution agreed that the company be wound up by the court.
- (b) Default is made in either holding the statutory meeting or in delivering the statutory report to the CAC. Sections 211, 410 (2) and 411 (3) of CAMA.
- (c) The number of members of the company has reduced to a number below 2 persons. Section 410 (2) (a) (i) of CAMA
- (d) The company is unable to pay its debts s.409 CAMA.
- (e) The court is of the opinion that it is just and equitable to wind up the company.

Default in holding or in delivering the statutory report of a statutory meeting under S. 211 of CAMA is not an automatic ground for winding up. The court may if it sees reason, instead of a winding up order, extend the time within which the meeting should be held or within which the statutory report should be sent to the Corporate Affairs Commission. However, the court may make orders as to costs to be paid to the petitioners as it thinks fit. s. 411 (3) of CAMA.

Inability to pay debt has been defined in S. 409 as follows:

- (a) Where a creditor to whom the company is indebted to a sum exceeding N2,000, issues a written demand for his money and the company is unable to pay the said sum within 21 days (3 weeks)
- (b) Where a court judgment or order in favour of a creditor is returned unsatisfied by the company
- (c) Where the court assesses the contingent and prospective liabilities of the company and is of the opinion that the company is unable to pay its debts.

Under the common law, it had been held by the House of Lords that once the conditions for proving that a company is unable to pay its debt have been satisfied, the company must be wound up. (*Bowes v. Hope Life Insurance & Guarantee Co.* (1865) 11 H.L. Cases 389.

Where the debt is genuinely disputed and there is reason to believe that the company has a reasonable defence, the winding up order will not be made. In *Re London and Paris Banking Corporation* (1875) L.R.19. Eq. 444. The company received furniture which the petitioner claimed to amount to £267. They put up a demand which was not satisfied in 3 weeks. They filed for winding up of the company. The company offered a defence that they disputed the debt that is why they did not pay. They had offered £155. But the petitioners had refused the offer before filing for winding up. After a valuation, the debt was put at £187. The court held that there was a bona fide defence of disputing the £267 debt. In the circumstance the winding up order was refused.

Prospective or contingent debts are debts which are not yet due but which the creditor feels that by the time they fall due, the company will not be in a position to pay and the assets may no longer be available to pay the debts.

Winding up on the just and equitable ground is an open ended ground. The door to what constitutes a just and equitable ground is left for the court to decide depending on the circumstances of each case. Under the common law, winding up has been granted under this reason, where the company's business had collapsed or ceased to be *Re German Date Coffee Co.* (1882)20 Ch.D 169, or where there is a dead lock on the Board and the management of the company is impossible to be carried on. *Re Yenidje Tobacco Co. Ltd* (1916)2 Ch. 426.

3.3 Who may Petition for Winding Up

The category of persons eligible to present a petition for the winding up of a company is provided for in section 410 of CAMA as follows:

- (a) The company itself through its Board of Directors or General Meeting. See section 63 (5) (b) of CAMA.
- (b) A creditor to the company whether or not his money is due i.e. prospective or contingent creditor whose money will become due at a later date or upon the happening of a given event.
- (c) The official receiver. See section 419 (1) of CAMA.
- (d) A contributory. See section 403 and 410 (2) of CAMA
A trustee in bankruptcy to, or a personal representative of a creditor or contributory
- (e) The CAC under section 323 and 410 (2) (d) of CAMA with the approval of the Attorney General of the Federation.
- (f) A receiver if authorized by the instrument under which he was appointed.

All of the above parties may present a petition for winding up jointly or severally.

3.4 Commencement of Winding Up

The winding up is deemed to have commenced at the time the petition for winding up is presented or filed in the court. Section 415 (2) of CAMA . Once the winding up has commenced, any disposition of the company's property is void. Section 413 of CAMA. No court attachment, sequestration or execution could also be levied on the property of the company. The creditors must wait to be paid when other creditors are being paid by the liquidator. Section 414 of CAMA.

3.5 Winding Up Order.

Once a winding up order is made, it technically means the company has ceased to exist as a legal person but in practical terms the company continues to exist until it is dissolved.

The consequence of this is that:

- (a) No legal action can be commenced against the company from then on, till it is dissolved, unless the leave of the court is obtained.
- (b) If the court does not appoint a liquidator to takeover the affairs of the company until it is dissolved, the official receiver (i.e Deputy Chief Registrar of the Federal High Court becomes the official liquidator until the court appoints one. S. 422 (3) (b) and 422 (7) (a) of CAMA.
- (c) The Directors and servants or employees of the company lose their jobs because their master, the company is dead. *Madrid Bank v. Bayley* (1866) L.R. 2 Q B 37 @ 40.

A copy of the winding up order shall be forwarded to the CAC. section 416 of CAMA.

3.6 The Liquidator

The liquidator in a winding up by the court is an officer of the court appointed to conduct the affairs of the company until it is dissolved. Section 422 (1)

His principal duties include:

- (a) Taking custody of the company's properties S. 423 of CAMA
- (b) Applying the assets of the company to discharge its liabilities S. 439 (1) of CAMA.
- (c) Pay off whatever is left to the contributories as dividends.
- (d) Perform such other duties as the court may order him. S. 422 (1) of CAMA.

Once he has completed his assignment, the liquidator may apply to the CAC to be discharged. If satisfied with the liquidator's report on completion of his assignment, the CAC may then discharge him. The release of the liquidator operates as a discharge from liability. S. 431 (4) of CAMA.

3.7 Dissolution

When the liquidator has sold off the assets of the company and settled the liabilities of the company and the contributories with whatever is left (if any) and the affairs of the company have been fully wound up, the liquidator shall apply to the court for the company to be dissolved and the company shall be dissolved accordingly. That marks the end of the company's life. s. 454 of CAMA

4.0 CONCLUSION

Although the company is supposed to live forever, there may be need in some cases to bring its life to an end. Winding up by the court is one of such means to an end for the company. Once the company has been wound up, it will have its name struck off the register of companies. Thus it will cease to exist.

5.0 TUTOR MARKED ASSIGNMENT

1. What are the grounds for a winding up order by the court?
2. Outline the categories of persons who are entitled by law to present a petition for the winding up of a company?

UNIT 2: VOLUNTARY WINDING UP

1.0 INTRODUCTION

Although a petition may be presented to the court to wind up a company, the members, if in agreement may also voluntarily pass a resolution to wind up the company.

When a company is being wound up by the voluntary resolution of the General meeting, it is referred to as voluntary winding up.

2.0. OBJECTIVES.

The aim of this lesson is to help the student:

- (a) To know the conditions for voluntary winding up
- (b) To know when voluntary winding up may be controlled by the members
- (c) To know when it will be controlled by the creditors
- (d) To know how voluntary converted into one winding up by the cour

2.0 MAIN CONTENTS

3.1 Conditions for Voluntary winding up. Section 457 of CAMA

A company may be voluntarily wound up in the following situations:

- (a) When the period if any fixed for the duration of the company by the articles expires, or the event, if any occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company passes an ordinary resolution requiring the company to be wound up voluntarily.
- (b) If the company resolves by special resolution that it be wound up voluntarily.

On the passing of any of the above stated resolutions, the voluntary winding up has commenced. Section 459 of CAMA. The resolution passed shall be

advertised in 2 daily newspapers and in the federal government gazette. section 458 of CAMA.

Once the winding up resolution has been passed, the question who between the members and the creditors will control the winding up will arise.

3.2 Members Voluntary Winding Up

Section 462 provides the test for deciding whether a voluntary winding up proceeds as a members' voluntary winding up or not.

If within 5 weeks before the passing of the resolution to wind up voluntarily, the directors make a declaration in the prescribed form, called statutory declaration of solvency, the winding up shall be a members voluntary winding up.

The statutory declaration is to the effect that the directors have made a full enquiry into the affairs of the company and are thereby of the informed opinion that the company will be able to pay its debts in full within 12 months of the proposed resolution to wind up. The directors who make a false declaration of solvency commit an offence and are liable each to a fine of N1,500 or imprisonment for a term of 3 months or both. If the company is unable to pay its debts in full within the 12 months after the resolution to wind up, the directors would be deemed to have made a false declaration of solvency unless the contrary is proved. Section 462 (3) of CAMA.

If the resolution to wind up voluntarily is made after the making of the declaration of solvency, the winding up shall be a members voluntary winding up.

Normally, after the declaration of solvency is made, the directors shall call a general meeting, pass the resolution to wind up voluntarily, then proceed

to appoint a liquidator to take over the affairs of the company. This is because upon passing the resolution the winding up is deemed to have commenced and the powers of the directors cease. Section 462 (1) & (2) of CAMA.

3.3 Dissolution After Winding Up

When the affairs of the company have been fully wound up i.e. the liabilities of the company discharged and the balance (if any) of the proceeds from the company's assets have been distributed to the share holders as dividends, the liquidator shall prepare a full account thereof.

He will then call a general meeting of the members and lay the account before them. After the conclusion of the meeting the liquidator shall within 7 days send a copy of the account to the CAC together with a report of the general meeting which was held to consider the account. Section 468 (2) & (3) of CAMA.

3.4 Conversion to creditors Voluntary Winding Up. Section 466 of CAMA

If in the course of the members voluntary winding up, the liquidator discovers that the assets of the company cannot pay the debts of the company in full, He shall forth with call a meeting of the creditors of the company, lay the report before them, thereafter the winding up shall convert to a creditors voluntary winding up.

3.5 Dissolution After Winding Up.

When the liquidator has completed his work and presented his report to the member sin general meeting and registered the report with the CAC, the company is deemed to be dissolved 3 months thereafter. Section 468 (4).

3.6 Creditors Voluntary Winding Up

Where it is proposed to wind up a company voluntarily and the directors are unable to make a declaration of solvency 5 weeks to the proposed date for considering the resolution, the winding up shall be a creditors voluntary winding up. Where the directors had also conducted enquiry into the affairs of the company and they are of the view that the company will be unable to settle its liabilities within 12 months if the winding up resolution is passed, the winding up shall proceed as creditors' voluntary winding up.

The company will call separate meetings of the members and the creditors on the same day or a day apart. The meeting of members will pass the resolution to wind up. The directors will then move over to the meeting of the creditors and lay before them a statement of the affairs of the company. section 472 (3) of CAMA. Thereafter they shall appoint one of the creditors to preside over the meeting. Section 472 (3) (b) of CAMA. The creditors may then proceed to appoint a liquidator to take charge of the affairs of the company and complete the winding up. S. 473 of CAMA. If the members in their meeting had appointed a liquidator, the one appointed by the creditors shall be the liquidator. However if the creditors fail to appoint one, then the one appointed by the members shall be the liquidator. Section 473 (1) of CAMA.

The creditors may at their first or later meetings appoint a committee of inspection comprising of not more than 5 persons to work with the liquidator to ensure that the interests of the creditors is well protected. This is needful because a voluntary winding up is converted to a creditors voluntary winding up when the directors are of the view that the assets of

the company may not be enough to settle all the creditors (S. 462 of CAMA).

The appointment of the liquidator terminates the powers of the directors except as the General meeting or the liquidator shall decide i.e.He decides on which powers of the directors they may continue to exercise. S. 464 (2) of CAMA.

When the liquidator is appointed, the Corporate Affairs Commission shall be notified within 14 days and the appointment shall be published in 2 daily newspaper and also delivered to the federal government printers for gazette. S. 491 of CAMA.

It is expected that the winding up should conclude within one year. Where however this is not possible, the liquidator shall call a separate general meeting of the company and that of the creditors at the end of the first year and each succeeding year that the liquidation lasts. This is to lay before the meetings an account of his stewardship. S. 477 of CAMA . See also S. 467 of CAMA.

The creditors may sack the liquidator if they are not satisfied with his work. If they do not, a minority may apply to court and on good cause shown; the court may remove the liquidator and appoint another one. S.482 of CAMA.

3.7 Final Meeting and Dissolution

As soon as the winding up is completed, the liquidator shall prepare his statement of account and lay it before the meeting of the creditors and before the general meeting of members of the company.

The liquidator shall thereafter send a copy of the statement of account to the CAC for registration. At the expiry of 3 months thereafter, the company is deemed to be dissolved section 478 (10 (4) of CAMA.

CONCLUSION

Voluntary winding up is best if all the members and creditors act maturely. It saves them time and expense which ought to have gone to the court and the lawyers involved in the winding up.

5.0. TUTOR MARKET ASSIGNMENTS

1. What are the legal grounds for voluntary winding up?
2. How may a voluntary winding up proceed as creditors winding up?
3. Discuss the procedure for arriving at members' voluntary winding up.

UNIT 3: WINDING UP SUBJECT TO COURT SUPERVISION

1.0 INTRODUCTION

A company may be wound up voluntarily by resolution of the members. It may thereafter proceed as either members or creditors winding up. In the course of the winding up however, disputes or differences may arise in the manner the winding up is being conducted . Aggrieved members or creditors may apply to the court to supervise the winding up process for them.

When the court by order agrees to supervise a voluntary winding up, it is called winding up subject to court supervision S. 486 of CAMA.

2.0 OBJECTIVES

1. To understand the nature of winding up subject to court supervision.

3.0 MAIN CONTENTS

3.1 Order for Court Supervision

If a company passes a resolution for voluntary winding up, the court may on a petition order that the voluntary winding up shall continue but subject to such supervision of the court and upon such terms and conditions as the court thinks just section 486 of CAMA.

3.2 Effect of Court Supervision

Winding up under court supervision shall be deemed to be a winding up under court order ie. It is proceeded with as if it is a Compulsory winding up and the court shall exercise power over the winding up as if it were a winding up by the court . Section 488 of CAMA.

A petition for winding up under court supervision is deemed in law to be a petition for compulsory winding up by the court. It means therefore that the winding up shall continue as if it were a winding up by the court. S. 487 of CAMA.

3.3 APPOINTMENT OF LIQUIDATOR

The court is at liberty to allow any liquidator already appointed to continue. The court may also remove the liquidator and appoint another in his place or instead appoint an additional liquidator to work with the one already appointed by the members or creditors as the case may be. S. 489 of CAMA.

The liquidator shall cause the court order making the winding up subject to court order to be advertised in the federal government gazette and in newspapers circulating in Nigeria within 28 days of the order S. 489 of CAMA.

The winding will however still be deemed to have commenced on the date the resolution for voluntary winding up was made s . 415 (1) of CAMA.

The winding up is under s. 488 of CAMA deemed to be a compulsory winding up so that any disposition of the property of the company and any attachment, sequestration, distress or execution of the estate of the company after the commencement of the winding up subject to court supervision is void.

4.0 CONCLUSION

Winding up under court supervision is a hybrid winding up. It has elements of voluntary winding up as well as winding up by court order i.e compulsory winding up.

5.0 TUTOR MARKED ASSIGNMENT

1. What is the effect of an order granting the court permission to supervise a winding up?

UNIT 4: MAJOR OFFICERS OF THE WINDING UP

1.0 INTRODUCTION

In the process of winding up, the effect of commencement of a winding up is that the directors' power to manage and direct the affairs of the company ceases.

There are officers who take over and manage the affairs of the company until it is dissolved. The process of a winding up could take one, two, or several years. During this period, the affairs of the company are managed by the major officers of the winding up.

2.0 OBJECTIVE

This unit will help the students:

1. to know and understand the major officers who manage the affairs of the company from commencement of winding up to dissolution.

3.0 MAIN CONTENTS

3.1 Official receiver

The Deputy Chief Registrar of the Federal High Court or any other officer designated by the Chief Judge of the Federal High Court is the official receiver. In a compulsory winding up, when the winding up petition is presented to the court, the powers of the Directors ceases. The official receiver takes over the affairs of the company pending the appointment of a provisional liquidator. Even if a provisional liquidator is appointed, He takes charge of the company along with the official receiver pending the appointment of the liquidator. Section 420 (1) and 421 (1) of CAMA.

3.2 Provisional Liquidator.

Upon the commencement of a winding up petition and pending the grant of the final order of winding up, the liquidator appointed (if any) shall be called provisional liquidator. He is appointed pending the outcome of the petition to wind up. If it fails, that terminates the appointment of the provisional liquidator. If the petition succeeds, a liquidator is appointed. The provisional liquidator may also be appointed the liquidator. Section 422 (1) of CAMA. It is usual however to appoint the official receiver as the provisional liquidator.

3.3 Liquidator

A liquidator is the person appointed to take charge of the company's affairs after the winding up order has been granted or in the case of a voluntary winding up when the resolution to wind up has been passed. Section 422 (9) of CAMA.

The liquidator takes over the assets of the company, sell them off, and pays off the company's liabilities. The balance of what is left is distributed as dividends to share holders and the company is then dissolved.

Nigerian Deposit Insurance corporation v. Obende, Provisional Liquidator of progress Bank Nig. Ltd (2001)5 NWLR pt 705, 184.

3.4 Proof and Ranking of Claims in Winding up

In winding up, the following is the order of payment.

1. Preferential payment

- (a) All local rates and charges, pay-as-you-earn-income tax, land, property, taxes etc.
- (b) Salaries of any clerk or Servant, labourers etc in respect of services rendered.
- (c) All accrued holiday remuneration of servants, labourers etc.
- (d) All other costs of the winding up.

2. Creditors
 - (a) Secured creditors
 - (b) Unsecured creditors
3. Shareholders
 - Section 492-494 of CAMA

3.5 Methods of Dissolution of Companies

When a company's life is brought to an end by the completion of winding up or otherwise, it is dissolved and struck off the register of companies in Nigeria.

There are four ways by which a company could be dissolved.

- (a) When a company is wound up and its assets sold off, the company is then dissolved.
- (b) When mergers take place, one or more companies may merge into another company or two or more companies may merge and become a new company. The companies that cease to exist as a result of the merger are dissolved. Where a company takes over another and the company that is taken over ceases to exist, it is then dissolved.
- (c) Business reconstruction. Where an existing company is re-organized due to an arrangement and compromise and it is reconstructed into a new company and the old company transfers its business to the new company, the old company is then dissolved.
- (d) Where the Corporate Affairs Commission confirms that a registered company is no longer carrying on business, it may strike it off the register of members and dissolve the company. S. 525 of CAMA.

4.0. CONCLUSION

The officers of the winding up are necessary to ensure that the up proceeds smoothly. They are independent persons and so are more likely to treat the creditors and the shareholders more fairly. The life of a company comes to an end when it is dissolved. Before the dissolution, the commencement of winding up terminates the management power of the directors. It is the officers of the winding up that manages the affairs of the company until it is dissolved.

In certain other situations like during business reconstructions, a company may be dissolved into another company without going through the process of winding up. This usually happen when companies merge or when they are acquired by another company.

5.0. TUTOR MARKED ASSIGNMENTS.

1. Discuss at least five officers involved in the winding up of companies under the CAMA?
2. Discuss the order of settlement of claims in a winding up proceeding?
3. What are the various ways by which a company may be dissolved?

MODULE 7

UNIT 1: FORMATION OF PARTNERSHIP

1.0 INTRODUCTION

Partnership is one of the forms of businesses permitted by law. A person may engage in business in three ways:

- (a) As a sole trader
- (b) as a partnership or business association; or
- (c) as a limited liability company.

Section 19 of CAMA allows people to carry on business as a partnership, association or co-operative society.

2.0 OBJECTIVES

1. To know the definition of partnership and the relevant laws
2. Legal requirement for partnerships
3. Capacity to form partnerships
4. Difference between partnerships and registered companies.

3.0 MAIN CONTENTS

3.1 Partnership Law in Nigeria

The English partnership act 1890 applied in Nigeria as a statute of general application. Later, the western states except Lagos enacted the Partnership Act, 1959. This act was a reproduction of the English partnership Act 1890 except that it contained additional provisions on limited partnership which is like an incorporated partnership. The then Bendel State, now Edo also enacted the Bendel state partnership law of 1976 which was also a reproduction of the western states partnership law. The English partnership

Act 1890 continued to apply as a statute of general application in the Northern states of Nigeria, Eastern states and Lagos.

Today most states in Nigeria have enacted the English partnership law 1890 into law in their respective states.

The partnership laws in force in the respective states are therefore similar.

Partnerships must however be registered in Nigeria under the Companies and Allied Matters Act, to operate lawfully or to be recognized by law.

No partnership consisting of more than 20 persons shall be formed for purpose of carrying on business for profit unless it is incorporated as a company in Nigeria (S. 19 (1) of CAMA.

The only exception to the above is if the partnership is:

- (a) A co-operative society registered under the laws of any state in Nigeria
- (b) formed as a partnership for carrying on of business as legal practitioners or chartered accountants provided each of the partners is a legal practitioner or chartered accountant as the case may be. S. 1 (2) (b) (i) & (ii) of CAMA

3.2 Definition

Partnership is the relationship which exists between persons who have agreed to carry on business in common with a view to profit. Section 4, partnership law, Kaduna state, S.3 partnership law of Lagos state and section 1 partnership Act (UK) of 1890 and S. 574 (1) of CAMA, 2004..

Mere agreement to carry on business is not enough, for a partnership to exist, the parties must have started business. The business must be for profit. This carrying on business for the benefit of the members without

intention to share profit may not amount to a partnership. Thus partnership cannot exist for charitable purposes.

Section 588 of CAMA defines business to mean any trade, industry, profession and any occupation carried on for profit.

For a business to amount to a partnership therefore, it must be carrying on business for profit. The said business must be a continuous one not a once and for all venture, although under the common law a partnership could exist for a single venture only. In *Mann v. D'Arcy*, (1968)2 All ER 172, the parties entered into a single venture for the purchase and resale of a quantity of potatoes. It was held that this transaction was a business carried on in common for profit and so qualified as a partnership. There is therefore a departure by the partnership laws in Nigeria from the U.K. position on this issue. In Nigeria, a once and for all business venture does not qualify as a partnership.

The business of the partnership must be carried on "in common" i.e. all the partners must be in the business together as to incur liability on behalf of each other. Intention to carry on business is not enough and does not thereby create a partnership. In *Keith Spicer Ltd v. Mansell* (1970)1 WLR 333 M. and B agreed to go into business together and to form a limited company later which would carry on business in M's restaurant. B ordered certain goods from Keith intending to use them for the business of the proposed company when formed. B. became bankrupt. Keith sued M. to recover the price of the goods contending that M & B were partners in business and therefore liable for each other's debts under the partnership. It was held that M & B were not partners as they were never carrying business in common.

3.3 Legal Requirements for the formation of a Partnership

- (a) The minimum number of persons required is two. The maximum is however 20. Only a firm of legal practitioners and chartered Accountants may have more than 20 members. A co-operative society too may have more than 20 members. Any firm except those stated above wishing to have more than 20 members must be incorporated as a corporate body. i.e registered company. Section 19(2) of CAMA.
- (b) Infants i.e persons under 18 years do not have the capacity to form or join in forming a partnership section 579 (3) of CAMA. However, an infant may join two other adults if permitted by the CAC to form the partnership if one of the partners submits a statement to the CAC to the effect that one of the partners is an infant. The statement shall be endorsed by a magistrate, legal practitioner or police officer of the rank of Assistant superintendent or above. Section 574 (6) of CAMA.
- (c) Persons of unsound mind may not join in forming a partnership.
- (d) Incorporated companies are qualified to join in the formation of a partnership. They are persons recognized by law. The Board of directors usually passes a resolution appointing someone to represent the company in the partnership.
- (e) Persons who have been declared to be bankrupt by a court of law cannot join to form a partnership.

- (f) Aliens are prohibited from forming a partnership with any other person to practice a profession or trade in Nigeria unless they obtain the consent of the minister of interior (internal Affairs) section 8, immigration Act, 2004.

3.4 Formation and Registration of Partnership

The Corporate Affairs Commission is responsible for the registration of partnerships and all other business names in Nigeria. A partnership must therefore be registered with the CAC to obtain registration certificate to do business in Nigeria. Section 573 & 574 of CAMA.

3.5 Business Name

The partnership must be registered under a name called firm name. This is the name in which the Corporate Affairs Commission will issue the certificate of registration and under which the partnership business will be carried on. Under S. 572 of CAMA,

A partnership must register its business name unless if;

- (a) The business or firm name consists only of the true names of all the partners without any addition e.g. Akume, Aondohemba, and Erdoo.

It means therefore that if there is any addition i.e. “Akume, Aondohemba, Erodo & Co.”, the firm name must be registered as a business name. If the firm name is a special coinage of the partners i.e. “Icon solicitors”, “VOX Dei chambers” etc. the name must be registered.

A business name shall not be registered if it contains the words “National” “Government”, “Municipal”, “Co-operative”, “Chamber of Commerce”, “Building Society”, “Guarantee”, “Trustee”, “Investment”, ‘ Bank”, “Insurance” or any such similar word or names that are identical or similar to an already registered business name or an existing trade mark.

The foregoing types of names may be registered only with the written consent of the corporate affairs commission. S. 579 of CAMA.

3.6. Certificate of Registration

Upon receipt of the certificate of registration, the partners shall cause a copy thereof to be exhibited in a conspicuous position at the principal and other places of business of the partnership, S. 576 (3) and 5 of CAMA.

3.7. Difference between partnership and Incorporated Companies.

The differences between a partnership and an incorporated company may be summarized as follows:

1. An incorporated has a distinct legal personality different from that of its owners. A partnership on the other hand does not have a distinct legal personality. Its personality is tied to that of its members. The partnership is regarded as one with its members.
2. The liability of the partnership is that of the individual partners. They are jointly and severally liable for the partnership debts. The members of the company are not liable for its debts unless the company is one with unlimited liability. In the case of a limited liability company, the liability of members is limited only to the value of shares they hold which they have not paid for.
3. The incorporated company has perpetual succession ,i.e. the life of the company is not tied to that of its members. The death of any or all its members does not end

the life of the company. In a partnership however, the life of the partnership is tied to that of any or all the partners. The death of one or all the partners means the end of the partnership.

4. The share capital of the partnership is flexible and not fixed by law. The partners increase or decrease their capital by agreement only. A company's capital however is fixed by law. The minimum is N500,000 for public companies and N10,000 for private companies. Once a company is registered, it cannot increase **or decrease its capital except with the approval of the CAC.**

5. A partnership unless it is one of legal practitioners or chartered accountants, or a co operative society cannot have more than 20 members. A company on the other hand could have as many members as it could if it is a public company or 50 members for a private company.

4.0. CONCLUSION

Partnerships are business names and are required to be registered by the Corporate Affairs Commission to have a legal basis to carry on business.

Only adults could form a partnership. The decision to allow infants is entirely that of the CAC. The CAC may however refuse such registration without infringing on any law

5.0 TUTOR MARKED ASSIGNMENTS

1. What are the legal requirement/qualification for the formation of partnerships?
2. Define a partnership under the Law.
3. What are the major differences between a partnership and an Incorporate company.

UNIT 2: TERMS OF PARTNERSHIP

1.0 INTRODUCTION

Partnership is a serious issue there is need therefore for parties thereto to have an agreement to guide their affairs.

Partnership may be entered into orally, in writing or by special agreement called deed of partnership.

It is however necessary to draw up a partnership deed or at least have a partnership agreement as a point of reference in case of disputes.

2.0 OBJECTIVES

This lesson is to help the students :

To know the usual terms contained in a standard partnership agreement or deed.

3.0 MAIN CONTENTS

3.1 Terms of Partnership Agreement or Deed

- (a) Parties. The agreement should contain the full names, address and occupation of the partners
- (b) Nature and place of business. The place of business should be stated. This will clearly state the head office and branch offices if any. The nature of business will also clearly be stated.
- (c) Commencement date will also be stated for record. This will help in determining the age of the partnership.

- (d) Duration. The life span of the partnership should be stated clearly with precision as the time or the occurrence of an event on the occurrence of which the partnership should be terminated. If no time frame is stated, the partnership is deemed to be open to termination at any time upon the request of any of the partners. Section 33 (a) & (b) of partnership Act of Lagos and section 24 of partnership Act of Kaduna state.

3.2 Capital of Partnership

The amount which each member contributes to the partnership should be stated. Where a partner contributes more capital than others, provisions should be made for the payment to him of interests on the capital before the sharing of profit. The desirability of this provision is in the fact that unless so stated partners do not share profits in proportion to their contribution.

In **LYON V. KNOWLE (1863) 3 B&S 556**, the court held that a business arrangement between a theatre owner and the hirer of the theatre under which the owner was to receive half *of* the amount paid by the audience for their seats was so unfair and clearly in favour of the theatre owner that it does not raise *even a prima Facie* presumption of a partnership.

Capital does not mean only cash. It could be in form of property contributed to the business, but whatever it is must be valued in cash. Where premium is payable, the time and method of payment should be settled. A premium is the price paid by an incoming partner in order to be admitted into the partnership. It is a kind *of fee* and it is paid before the incoming partner is formally admitted, or after his admission.

Where one partner has paid a premium to another on entering into a partnership for a fixed term and the partnership is dissolved before the expiration of that

term otherwise than by the death of a partner the court may order the repayment of the premium or of such part thereof as it thinks just having regard to the terms of the partnership agreement and to the length of time during which the partnership has continued, unless:

- a. the dissolution is by the judgment of a court and is wholly or chiefly due to the misconduct of the partner who paid the premium; or
- b. the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

3.3 The Firm Name

The partners should agree as to the name they want their firm to answer. They are quite free to take any name, so long as the name is not identical to an already registered business name, or contrary to the provisions of s.662 the Companies and Allied Matters Act. 1990.

- (f) Bank Account. The partnership Bankers should be stated. Those to be signatories and how they are to sign should be stated

3.4 Arbitration

The agreement between the partners may also contain an arbitration clause, which means that in the event of a conflict the partners shall settle the issue either by themselves or by involving other parties first without recourse to the law courts. The reason for such a clause is that it is injurious to the interest of the partnership for the public to know that it is involved in litigation, even among its members. Customers may panic and the partnership may suffer irrecoverable losses as a result.

The use of a private arbitration panel ensures the protection of all the rights or parties involved and lead to an amicable settlement of disputes outside the court.

3.5 Management

Partners should agree as to how the firm's business is to be organised and run. The partners may specify whether all or some of the partners shall manage the business and whether such managing partners are to spend part or all of their time in the firm's ventures.

In the absence of such stipulations, s.26(e) of the Kaduna State Edict for example provides, that each partner is entitled to participate in the management of the business. Where agreement is reached on who are to be managing partners, there should also be an agreement upon the duties they are to perform and the extent of their powers. They should also decide whether the managing partners are to be entitled to any remuneration. This is because s.26(f) of the Kaduna state Partnership Edict for example disentitles managing partners from taking any remuneration for acting in the partnership business since they share in the partnership profit. A managing partner is therefore not entitled to remuneration unless there is a special agreement, express or implied, to that effect.

3.6 Salary.

Unless expressly provided for, it is presumed that no partner will draw a salary except refund for out of pocket expenses and share in the profits of the partnership.

3.7 Retirement

Where the partnership is for a fixed term, there should be a provision for retirement of partners, otherwise a partner cannot retire except as a result of a subsequent agreement of all partners. But where the partnership is for an indefinite duration and no provision is made for retirement a partner may retire at will and this automatically dissolves the partnership.

It is essential for partners to agree as to what happens upon the retirement of a partner because retirement dissolves the partnership. A retiring partner must give notice to all other partners.

3.8 Expulsion or suspension.

The conditions should be clearly stated to avoid dispute. Expulsion or suspension cannot take place unless clearly provided for. The right to fair hearing shall be observed. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement in writing between the partners. There can be no implied agreement to expel a member. The agreement must be express. The provision is a check on all partners from using frivolous means to expel partners from the firm. In *OZODO V. OKWUANIZOR* (1961)5 ENRLR 29 the High Court of Enugu held that both at common law and by the combined effect of Sections 24(8) and 25 of the 1890 partnership Act, no partner can be excluded from the partnership by a decision of a majority of partners unless the partnership agreement specifically so provides, and that all existing members of the partnership must either take part in, or approve, the decision having had notice of it.

An expulsion must be *bona fide* and made in the interest of the partnership. Notice must be given to the partner to be expelled with an opportunity to

reply. Where there is an equal or an even number of partners and there is a deadlock in arriving at a decision affecting the business, as held in DONALDSON V. WILLIAMS(1833) 1 C&M 345, the status quo will remain.

3.9 Dissolution.

Generally partnership may be dissolved when

- (1) the tenure of the partnership expires
- (2) when the business of the partnership ceases or is banned by law
- (3) when a partner dies or is bankrupt or becomes of unsound mind, unless the partnership agreement says otherwise.
- (4) when a partner gives notice to terminate the partnership
- (5) when a partners is unable to meet up with his contribution to the partnership etc.

3.10 New Partners

Partners may make provision agreeing to the admission of new member into the firm. Similarly, they may agree to make provisions for the child, personal representative or other nominee of a retiring or deceased partner to be admitted into the partnership. In all cases, however, new members cannot be introduced without the consent of all existing members. .

4.0 CONCLUSION

Partnership terms are better stated in writing. They are better preserved and they are the point of reference in cases of dispute.

The importance of the terms of a partnership agreement lies in the fact that reference can always be made to it to determine the nature of the business, including the rights and duties of the partners.

A partnership agreement is the result of the consensus of the aggregate partners and the partners are quite at liberty to stipulate the rules which regulate the business 'Which they have agreed to embark upon. However, whatever rules they make must conform with the nature of partnership and be within the scope of the law.

The concept of freedom of contract is that parties freely contract and by the same freedom the mutual rights and duties of partners (whether ascertained by agreement or defined by law) may be varied by the consent of all partners and such consent may be either expressed or inferred from a course of dealing.

Consent is therefore the cornerstone of any partnership. Without it, however, a fair inference from the conduct of the partners or the course of dealing may be drawn. It does not matter how a contract of partnership is drawn, so long as the intention of the partners is known. However made, it is subject to variation at the will of all the partners. The case of *ENGLAND V. CURLING*(1884) 8 Beau 129, demonstrates the extent of flexibility of the partnership business. In that case, the plaintiff and two of the defendants agreed to become partners as ship agents for seven, fourteen, and twenty one years durations, and then duly signed the agreement with their initials. A deed *was* prepared to carry out the agreement, but was never executed and it differed somewhat from the original agreement.

The parties carried on business for eleven years and then they started quarreling. The defendant, who appears to have been in the wrong from the

beginning, gave notice to dissolve the partnership in three months. He retired from the partnership and entered into another partnership with other persons, carrying on business with them on the premises and in the name of the old firm. The new firm opened letters addressed to the old firm, and gave notice of its dissolution to its correspondents. The plaintiff filed an action for specific performance and injunction against them.

The court granted the relief sought. However, Lord Langdale, MR had this to say:

"With respect to a partnership agreement, it is to be observed that all the parties being competent to act as they please, they may put an end to or vary it any moment; a partnership agreement is therefore open to variation from day to day, and the terms of such variation may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting their business. (page 133 of the report.)

The terms of the partnership agreement means the *usual* terms which the court will be willing to recognise and order enforcement in the absence of express provisions stipulated by the parties.

5.0 TUTOR MARKED ASSIGNMENTS

1. List and discuss at least 5 terms that usually appear in a partnership deed.

UNIT 3: RELATIONSHIP BETWEEN PARTNERS AND THIRD PARTIES

1.0 INTRODUCTION

The relationship between the partners and between them and third parties determines the civil and criminal liability of the company and the overall success of the partnership. The relationship is governed both by statute and by the common law.

2.0 OBJECTIVES

This lesson is to help the students understand :

1. how the relationship between the partners is regulated
2. how the relationship between the partners and third parties is regulated

3.0 MAIN CONTENTS

3.1 Relationship between the partners

The relationship between the partners is principally regulated by the partnership deed or agreement and the implied terms of the agreement.

However the general principles under the common law are based on utmost good faith. The partnership itself is based on the trust and friendship between the partners. In the above regard, the following rules are applicable under the common law.

- (a) All partners are entitled to a share equally in the capital and profits of the partnership and they share equally in the losses of the partnership.
- (b) No partner is entitled to any interest before profits are declared.
- (c) Every partner should take part in management of the partnership

(d) No partner may introduce another person as partner without the prior consent of the others. This is because the partnership is founded on mutual trust and confidence. The introduction of a new member must therefore be viewed seriously by all the partners. An incompetent and dishonest partner may cause serious loss or embarrassment to the partnership. Where however the partnership articles or agreement allows a person the right to introduce a new partner, if he does so in the manner (if) any provided in the partnership agreement or deed, prior consent of the other partners is not necessary as consent in this case is implied.

In *Byrne v. Reid* (1902)2Ch. 735, the partnership deed between B. and R. allowed B the power to introduce any of his sons into the partnership on their retaining the age of 21 years. when one of B's sons attained the age of 21, B proposed to introduce him to the partnership. R. refused. The court held that R. could not prevent B's son from becoming a partner because the partnership deed operated as a consent.

(e) Every partner is under obligation to render true account and full information on all things affecting the partnership to other partners.

(f) Every partner shall disclose and account for any benefit derived by him in the course of the business of the partnership without the knowledge or consent of the others. X., Y., and Z were partners. X without the knowledge of Y and Z obtained for his own benefit the renewal of the lease of the business premises. The premises belonged to the partnership. It was held that X was duty bound to disclose and account for the secret benefit derived from lease of the partnership property. In another common law case, *Bentley v. Graven* (1953)18 Beav. 75, B and C. were partners. C was asked to buy some goods for the firm. C. without B's knowledge sold his own goods to the firm at a considerable profit without disclosing to B. that the goods were his own.

It was held that C must account to the firm for the secret profit made without disclosure. C, being a partner, ought to have disclosed to B that he (Mr. C) was going to sell his own goods to the partnership. The non-disclosure is capable of eroding the mutual trust and confidence between the partners.

- (g) A partner must not carry on a competing business or divert the partnership business, or use the partnership information, good will or property for personal benefit not authorized by the others.

3.2 Relationship of partners with third Parties.

Every partner is the agent of the firm and his partners for the purpose of the business of the firm. The acts of every partner who does any act while carrying on in the usual way, the business of the kind carried on by the firm, binds the firm and his partners unless :

- (a) the partner so acting has no authority to act for the firm in that matter; and
- (b) the person with whom he is dealing either knows that he has no authority or does not know or believe him to be partner.

Subject to the limitation just mentioned, every partner has implied authority to bind the firm by:

- (a) selling the goods of the firm;
- (b) purchasing on the firm's behalf goods of the kind usually employed in the firm's business;
- (c) receiving payment of the firm's debts and giving receipts for them; and
- (d) engaging servants for the partnership business.

In trading firms a partner may further:

- (e) accept, make and issue negotiable instruments in the firm's name;
- (f) borrow money on the firm's credit and pledge the firm's goods to effect that purpose; and
- (g) engage a solicitor in an action against the firm for a trade debt (*Tomlinson v. Broadsmith* (1896) 11 Q.B. 386).

It was held in *Higgins v. Beauchamp* (1914) 3 KB.1192, that a trading firm is one which carries on the buying and selling of goods, but it is thought that this is only one example of a trading partnership and that it would be too narrow to confine this concept to those activities. In that case, B. and M. carried on business in partnership as proprietors and managers of picture houses. The partnership deed prohibited a partner from borrowing money on behalf of the firm. M. borrowed money from H. it was held that the firm was not liable for the debt, because it was not a trading firm, and M. had therefore no implied authority to borrow on the firm's behalf.

A partner may not, however, bind the firm by deed unless he is expressly authorised by deed, and he may not bind the firm by a submission to arbitration (*Stead v. Salt* (1825) 3 Bing. 101).

The firm and all the partners are bound by any act relating to the firm's business done in the firm's name, or in any other way showing an intention to bind the firm, by any person authorised, whether a partner or not. A partner has not, however, implied authority to bind the other partners in another business. D. & Co. were a partnership consisting of D., T. and L. and carrying on the business of produce dealers. D. was the only active partner. To cover the possibility of loss, D. asked M., the plaintiff, whether M. was prepared to buy a consignment of potatoes on board S S *Anna Schaar* as a

joint venture, *i.e.* on the basis of sharing profits and loss, and M. agreed. M. contended that the joint venture was itself a partnership between him and D. & Co., and sued T. and L. for half his share in the profits arising from that venture. Held, the contention of M. was correct and the venture was concluded by D. for the partnership and could not be considered as "another" business; consequently, D. bound not only himself but also T. and L.: *Mann v. D'Arcy and Others* 11968] 1 W.L.R. 893.

If a partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary business, the firm is not bound unless he was specially authorised by the other partners. The partner himself is personally liable, and his act may subsequently be ratified by the firm. Again, if it has been agreed between the partners that any restrictions shall be placed on the power of any of the partners to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement . With respect to persons having no notice, the firm will be bound, notwithstanding the restriction, if the act done is within the ordinary course of business of the firm (*Mercantile Credit Co. Ltd v. Garrod* 11962] 3 All E.R. 1103).

The firm is liable for torts or wrongs of each partner if committed in the ordinary course of the firms' business or with the authority of the other partners .

A partner in a firm, whose business it was to obtain by legitimate means information about the business contracts of competitors, bribed the clerk of a rival to break his contract of service by betraying his masters secrets. The bribe came out of the firm's money, and the profits went into their assets. Held, as the partner had done illegitimately that which it was part of his

business to do legitimately, the firms were liable for his act: *Hamlyn v. Houston & Co.* (1903)1 K.B. 81. (See also *Allied Pharmaceutical Distributors Ltd v. Walsh* (1991)21.R.18).

If a partner acting within the scope of his apparent authority receives the property of a third person and misapplies it, or if the firm in the course of its business receives the property of a third person and, while it is in the firm's custody, a partner misapplies it, in each case the firm is liable to make good the loss. This is really a statement of what are ordinary agency principles. Thus if a partner, acting within the scope of his apparent authority, becomes constructive trustee of property received, then equally so will his fellow partners .

The UK Partnership Act 1890 provides that the liability of each partner in respect of the firm's contracts is joint (section 9). The liability of partners in respect of the firm's contracts is joint and several. The liability of partners in respect of the firm's torts is also joint and several (section 12).

Examples—A. and B. are partners. X. sues A. on a contract of the firm and recovers judgment against him, but the judgment *is* unsatisfied owing to A.'s lack *of* means. X. can sue B.

A. and B. are partners. X. sues A. on a wrong for which the firm is responsible and recovers judgment which is unsatisfied. X. can bring an action against B. for the unsatisfied balance *of* his claim, because B.'s liability is joint and several.

The estate of a deceased partner is liable severally for the debts and obligations of the firm so far as they remain unsatisfied, but subject to the prior payment of his separate debts.

3.3 Liability of person by "holding out"

A person may be liable like a partner for the debts of the firm although he is not in fact a partner, if he by words spoken or written or by conduct represents himself or knowingly allows himself to be represented as a partner in the firm by the partners or any of them. His liability in such a case is only to those persons who have, on the faith of such representation, given credit to the firm (section 14 partnership Act 1890,UK); he is not liable, therefore, for the torts or wrongs of the firm, because such a liability does not depend on giving credit. *In Beavan v. The National Bank Ltd,(1906) 23 TLR 65*, B. carried on business as, M.W. & Co., and employed M.W. as the manager of the business. *Held*, these facts amounted to a holding out that M.W. was a partner.

A holding out which makes a person liable as a partner to a third person, does not necessarily establish that he and the person holding him out are, in fact, partners *inter se* though it provides some evidence tending to point to a partnership *Floydd v. Cheney (1970) Ch. 602*.

When a partner dies and the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part of it does not of itself make his estate liable for any partnership debts contracted after his death (section 14(2) UK partnership Act,1890.

In *Bagel v. Miller (1903) 12 KB 212*, M. was a partner in a firm. The firm ordered goods in M.'s lifetime, but delivery was not made until after M.'s death. *Held*, M.'s estate was not liable for the price in an action for goods sold and delivered as there was no debt due *in respect of* the goods in M.'s lifetime.

3.3 CHANGE OF PARTNERS

When a person is admitted as a partner into an existing firm he does not thereby become liable to the creditors of the firm for anything done before he became partner (section 17(1)1890 partnership Act, UK). The new firm may take over the old firm's liabilities, but this of itself does not give the creditors any right to sue the incoming partner. This right may be acquired by novation which is an agreement, express or implied, between the creditor, the new firm and the old firm by which the original contract between the creditor and the old firm is discharged by the acceptance of the liability of the new firm.

A partner who retires from the firm remains liable for the partnership debts contracted while he was a partner. He may, however, be discharged from liability by an agreement between himself, the new firm and the creditors, and this agreement may either be an express one or be inferred from the course of dealing (section 17, 1890 Act).

For the debts of the firm incurred *after* his retirement he is liable to persons who (a) dealt with the firm before his retirement and continued dealing with the firm under that understanding that he is still a partner, unless he has given them notice that he is no longer a partner; or (b) had no previous dealings with the firm, unless he has either given notice of his retirement or had advertised it in the gazette or newspapers s.36 1890 Act

The estate of a partner who dies or becomes bankrupt is not liable for partnership debts contracted after the date of the death or bankruptcy.

A continuing guarantee given to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm (section 18 1890 Act).

3.4 Engaging servants for the firm.

A partner who while acting within the scope of his apparent authority receives property from a 3rd party and misapplies it will bind the partnership in liability to pay. So also a partner who misappropriates a 3rd party's property in the custody of the partnership or a partner.

The above liability is possible because every partner in law is an agent of the other. Section 7, Kaduna state partnership law 1991. (This law is the same with the others operating in other part of Nigeria). It is derived from the UK partnership Act 1890 which was a statute of general application in Nigeria.

4.0 CONCLUSION

Partnership business is based on trust. People should not enter into partnership with persons they do not trust as they are likely to bring misfortune to the other partners by creating liabilities for them with 3rd parties. This is so because the law treats each partner as an agent of the other.

5.0 TUTOR MARKED ASSIGNMENTS

1. All partners in a partnership are agents of each other while acting within the scope of the partnership business, discuss this fact in the light of partners liability towards each other.
2. Discuss the instances where a partner could bind the partnership firm in liability to third parties.

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UNIT 4: DISSOLUTION OF PARTNERSHIP

1.0 INTRODUCTION

Partnerships are business organizations whose existence is tied to that of the existing partners. It does not have a separate or independent existence like incorporated companies.

In view of the above therefore, a change in the membership of the partnership technically results in the dissolution of the partnership unless otherwise stated in the partnership deed or agreement.

2.0 OBJECTIVES

To help the student understand the grounds and circumstances under which a partnership could be dissolved.

3.0 MAIN CONTENTS

3.1 Dissolution of Partnership.

Grounds for dissolution partnerships may be summarized as follows:

- (a) A partnership may be dissolved by court order where the court is of the view that it is just and equitable to do so. In *Re: Yenidge Tobacco Co.* (1916) 2 Ch. 426, a limited partnership was wound up because of a dead lock in the management. The two managing partners could not see eye to eye and communicated only by notes through the secretary. The court held that it was just and equitable to wind up the partnership since the relationship between the partners had collapsed.
- (b) The court may also dissolve a partnership due to the mental incapacity of one or more of the partners. However, court order is not required if the partners agree among themselves to continue.

- (c) Where one of the partners is permanently incapacitated it is a ground to seek court order to dissolve the partnership.
- (d) When the business of the partnership can only be carried on at a loss i.e. where there is no possibility of making profits.
- (e) Where the acts of one of the partners become unbearable for the others it could also be a ground for dissolution. The acts of a partner which continues to embarrass the other partners and thereby prejudice the credibility of the partnership could be a ground for dissolution. This will be correct only if the said acts affect or are capable of injuriously affecting the business of the partnership. Examples include a situation where a partner in a firm of say legal practitioners is convicted of professional misconduct or criminal misappropriation of clients' monies etc. or where the partner is caught in adulterous relationship in a highly moral or religious society or environment. In *Carmichael v. Evans* (1904) 1 Ch 486, C and E were partners. C was convicted of dishonesty by fraudulently travelling on a public train without a valid ticket. It was held that the conviction for dishonesty was detrimental to the partnership business being that partnership is built on mutual trust. No person would want to be in partnership with a convict or dishonest person particularly where the said acts are injurious to the partnership business.
- (e) Where a partner consistently or willfully breaches the partnership agreement, such as making secret profits, diverting partnership businesses, or keeps erroneous accounts to conceal fraudulent deals against the firm etc.

The court will not dissolve the partnership on allegation of mere squabbles, except if the squabbles result in serious breach of confidence such that the partners can obvious not work together again.

The above ground could be a basis for court action to dissolve the partnership or it could be dissolved amicably if so provided in the agreement that any of the said grounds could be a basis for dissolution. The party calling for the dissolution will give notice to the others.

- (f) Where the business of the partnership becomes unlawful or illegal or where the business of the partnership can no longer be carried on under a partnership, then it has to be dissolved. In Nigeria, under the immigration Act, business cannot be carried on with a foreigner unless the business is an incorporated company.
- (g) When one or more of the partners is declared a bankrupt by a court of law.
- (h) When the period fixed for the duration of the partnership elapses or the event occurs on the occurrence of which the partnership must be dissolved.

3.2 Application of Property on Dissolution

The properties of the partnership will be sold. The proceeds will be added to any money at hand. The debts and liabilities of the partnership will be settled first. The surplus will be divided among the partners or their estates as agreed in the partnership deed or agreement.

Where the assets are not enough to settle the partnership debts, each partner will contribute in the proportion of which they normally share profits.

3.3 Consequences of Dissolution

The need to discuss the consequences that follow the dissolution of a partnership arises from the rights and obligations of the partners and those of third parties. The rights and obligations of these parties do not automatically end with the termination of the partnership. Some of the rights and obligations subsist until "winding up" of the firm is completed.

In order to wind up the affairs of a partnership that has been dissolved, it is imperative to pay debts, if any, first. Secondly, it is essential that all questions pertaining to accounts between the partners are settled, and, thirdly, to divide the surplus assets, if any, between the partners in settled and agreed proportions. Where the assets cannot satisfy the debts of the partnership, the partners are to make up for the deficit by a proper contribution among themselves. Sometimes, when disagreements occur in these matters, recourse is had to the court of law to effect a proper winding up. To this effect, S. 41 of the Partnership Edict of Kaduna State for example provides that:

On the dissolution of a partnership every partner is entitled as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the partnership property applied In payment of the debts *and* liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due from them so partners to the firm and for that purpose any partner or his representative may on the termination of the partnership apply to the court to wind up the business and affairs of the firm.

This section deals extensively, in addition to other sections with the rights of partners as to the application of partnership property on dissolution of the firm. It is suggested that the rights enumerated in Section 41 above are due not only to the partners, alone, but also their assignees and personal representatives, and also, that the rights amount to a lien, equitable or possessory and comparable with a floating charge.

3.4 Distribution of Assets on Final Settlement of Accounts

Section 46 of the Partnership Edict, 1990 (Kaduna State) provides certain rules to be applied in distributing assets on a final settlement of accounts. The rules, like most of the provisions of the Edict, are subject to any agreement between the partners to the contrary. The rules are as follows:

- (i) Losses, including losses and deficiencies of capital, shall be paid first taken out of profit, if the losses are not cleared, the balance will be taken out of capital, and lastly, the partners will have to individually contribute in the proportion in which they are entitled to share profits to clear off the losses..
- (ii) The assets of the firm, including the sum, if any contributed by the partners to make up for the deficiencies of capital, shall be applied in the following manner and order:
 - a) in paying the debts and liabilities of the firm to persons who are partners therein.
 - b) in paying to each partner rateably what is due from the firm to him for advances as distinguished from capital.

- c) in paying to each partner rateably what is due from the firm to him in respect of capital and
- d) the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

Any of the provisions may however, be negated by contrary agreement between the parties, express or implied. Where a partner has advanced money by way of loan to the firm, this must be paid to him first before settlement of accounts between him and other partners in respect of their share in the partnership property. Similarly, where a partner owes the firm any debt he cannot claim his entitlement until he has satisfied such debt.

In respect of creditors, dissolution does not relieve partners from unsatisfied liabilities incurred before the dissolution.

After dissolution the authority of each partner to bind the firm continues so far as may be necessary to wind up the affairs of the firm and to complete unfinished transaction at the time of the dissolution. Other than this, partners cease to be agents of the firm and of the other partners. Also, on the dissolution of the firm or the retirement of a partner, any member may publicly notify the same and require the other partner or partners to concur for that purpose in all necessary and proper acts, if any, which cannot be done without his or their concurrence. As provided in S. 48 of the Edict, third parties are still entitled to their claims after dissolution.

4.0 CONCLUSION

Partnership may be dissolved by seeking court order or it may be dissolved amicably. The grounds for court order are also the grounds for amicable dissolution. The choice is for the partners to make depending on the circumstances of the case.

5.0 Tutor Marked Assignment

1. Explain the circumstances when it would be desirable to dissolve a partnership if the partner concerned so wishes?
2. Discuss how partnership property is distributed upon dissolution?