APPOINTMENT, CONTROL, NATURE, DUTIES AND RIGHTS OF COMPANY LIQUIDATORS IN NIGERIA

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Introduction

This paper examines the appointment, control, nature, duties and rights of company liquidators in Nigeria. The title "liquidator"[1] was first applied in the Joint Stock Companies Act of 1856, to the person entrusted with the task of winding up the affairs of the company, and it was also this Act which originated the distinction, still preserved today, between the official liquidator who is appointed by the court in compulsory winding up, and the liquidator appointed in voluntary winding up. Prior to this enactment, the Joint Stock Companies winding up Act 1848 and 1849 empowered[2] the Master of the Court of Chancery to appoint a person to be the official manager of a company undergoing winding-up, and it is to this functionary that the present office of official liquidator owes some of its characteristic features.

Thus, the rule that the official liquidator acts under the control and direction of the Court, originated in the position occupied by the official manager under these early Acts. The

[1] McPherson B.H. *The Law Relating to Liquidation on Limited Liability Companies*, 2nd Edition Sydney Publishers 1980, p. 180

[2] Section 22 Joint Stock Companies winding-up Act 1848 .

resemblance is manifest in other respects also, notably in relation to his power of conducting legal proceedings brought by or against the company,[3] his right to a remuneration which is normally calculated according to work done and in his general duty of getting in and realizing the assets of the company,[4] winding-up its business, paying its debts and distributing the surplus among the persons entitled.[5]

Incorporation of Joint Stock Companies was generally permitted in 1844, but the concept of corporate personality was not at first carried over to the process of winding-up. According to McPherson,[6] the feature, which serves to mark off the modern company from its older deed of settlement counterpart, is also that which separates the contemporary liquidator from his predecessor. For instance, instead of his simply assuming as the liquidator does now, the office and functions of the company directors, the official manager was on his appointment, vested with all the estate, effects and rights of action of the company.[7] By contrast, under the present scheme of winding up, there is no "*Cessiobonorum*" to the liquidator of the property of the company, yet, although in consequence he is not a trustee, in the strict sense, of the assets he administers, the liquidator is nevertheless an agent of a fiduciary kind and one, who is expected to display a high standard of skill and care in the performance of his duties.

Qualification and disqualification of a company liquidator

The liquidator's responsibility is enormous and complex as it involves coordinating the liquidation process which includes balancing of conflicting interest of the parties who stand

[3] Sec. 22 Ibid
[4] Ibid Section 34
[5] Joint Stock Companies Act 1844.
[6] McPherson *The Law Relating to Liquidation on Limited Liability Companies*, 2nd Edition Sydney Publishers 1980, p 181.
[7] *Section 29 Joint Stock Companies winding-up Act* 1848

to benefit from the liquidation, that is, the creditors and the contributories. In view of this, it becomes imperative for anybody appointed liquidator to have considerable skill and experience in corporate and insolvency practice. CAMA guideline on persons who cannot be appointed as liquidator reflects the enormity of his responsibilities .Section 509(1) CAMA declares the following persons ineligible for appointment as liquidators:

a) An infant

b) Any person found in the court to be of unsound mind

c) A body corporate

d) An un-discharged bankrupt

e) Any director of the company under liquidation, and

f) Any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who has been banned under section 254 from being a director of, or from being otherwise involved, directly or indirectly, in the management of a company.[8]

Any appointment made in contravention of the provisions of subsection (I) of this section shall be void and if any of the persons named in paragraphs (c), (d), (e) and (f) of that subsection shall act as a liquidator of the company, he shall be guilty of an offence and liable to a fine not exceeding ₦2,500 in the case of a body corporate or, in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding ₦500 or to both[9].

[8] *Re Tweeds Garages Ltd* (1962) 1 Al. E.R. 121 at 122.
[9] *Re Cuthbert Cooper and Sons Ltd* (1971) 1 U. I. L. R. 421.

The disqualification of an infant, persons of unsound mind and an un-discharged bankrupt in this regard is because, it is recognized that an infant may be a member of a company as being a member does not require special skill or cognate experience. As far as the office of a liquidator is concerned, an infant lacks the necessary mental ability and experience to discharge the responsibility of the office. The office of a Liquidator deserves the appointment of a knowledgeable person in his chosen career and full of management skill. The disqualification of an infant as a company liquidator is highly innovative and constitutes one of the notable changes brought by the Companies and Allied Matters Act. Generally speaking, in law, an infant is not criminally responsible. He lacks mental capacity to know the consequences of his acts or omissions.

This section[10] is in harmony with that of section 257 of CAMA which disqualifies an infant from being appointed a director of a company. Equally, persons of unsound mind lack sufficient understanding in discharging the cumbersome duties and demands of the office of a liquidator[11].

It is an offence to appoint or allow any director of the company under liquidation to act as a liquidator by virtue of section 509(1) (e) CAMA. This provision is commendable because should the directors of a company under liquidation be allowed to be appointed or act as a liquidator, a statutory mechanism to cover up the director's shady dealings would have been entrenched. It will then be easier to use the "company's directorship" as an engine to perpetrate fraud. Section 509(1) of CAMA therefore prevents a director from having

[10] Section 509 of CAMA

[11] It should be noted that more calling of a person as unsound will not suffice under the subsection. A finding by a court of law in respect of insanity of any person is enough, in our view, under section 509(1)(b)

opportunity to use the office of liquidator for selfish ends to the detriment of the creditors and contributories of the company.

However, on the authority of the *Expressio Unius est Exclusio Alterus (The Express mention of one excludes the other)* rule, it is submitted that any person who is not listed in section 509(1) of CAMA can be appointed as liquidator of a company without regard to the level of his skill and experience in corporate insolvency practice. This is not an impossible proposition as a mariner was appointed liquidator of the Nigerian National Shipping Line Limited.[12] The courts being mindful of the fact that a strict interpretation of section 509(1) of CAMA would compromise the effective liquidation of companies; they have established a practice of not appointing a person as liquidator unless he has been a solicitor or a member of a recognized body of accountants for a substantial period. For instance, Chike Ofodile, a Senior Advocate of Nigeria and former Attorney General of the Federation was appointed liquidator.[13]

THE POSITION IN ENGLAND

In England, the approach of the Insolvency Act of 1986 to the issue has been, like the CAMA, to disqualify certain categories of persons from being appointed liquidator.[14] In addition, the English Act authorizes the Secretary of State for Trade and Industry to recognize certain professional bodies including liquidators to be appointed after they have been licensed by one of the said bodies for such purpose. Accordingly, the secretary of state

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[12] Nwokoro, O.C. (In Umuzulike A. ed) *An Assessment of the Efficacy of the various Agencies of the compulsory Liquidation process, Perspectives in law and justice*, *Fourth Dimension Co. Ltd* (1996) p. 259.
[13] Ibid P. 259 See also *re Ickneild Development Limited* (1973) 2. All E.R. 1968. In the Nigerian case of *Anakwenze V. Tapp Industries Ltd*. (1991) 7 NWLR pt. 202 page 177, Chike Ofodile was appointed a Liquidator.
[14] Section 390(1) of the Insolvency Act, 1986 of England . The list of such persons is quite similar to that contained in section 509(1) of CAMA

has gone on to recognize mainly the principal bodies of solicitors and accountants. It seems that the English approach arrives, albeit through a rather circuitous route, at the same position as its Nigerian counterpart as laid down by judicial practice, i.e. that only solicitors or accountants will be appointed liquidators of a company.

Section 509(1) (c) of CAMA disqualifies a body corporate from being appointed a liquidator. This provision is similar to section 634 of the English Act, The provision of section 509(1) (c) of CAMA will not apply to the NDIC as section 38 of the BOFIA provides that a body corporate can act as liquidator of a failed bank whose licence had been revoked. The implication of this is that the earlier fear of the possibility of an incompetent person being appointed liquidator will not be relevant to the banking sector as there already exists a specialist body which is charged with the responsibility of liquidating banks. The court has also by implication included additional ground as to the disqualification to the office of the liquidator in *Vico Agro Allied Industries Ltd. V. Orient Bank of Nig. Plc,*[15] by stating that a person cannot be appointed a liquidator or a receiver in respect of his own property. In other words, a company in liquidation can never be appointed a liquidator to wind up the affairs of that company. Nor can a company in liquidation be appointed a receiver to take possession of and protect the property of the company in liquidation.

What can be perceived from the foregoing discourse, as a major negative point about the office of the liquidator is the failure of CAMA to lay down guidelines, which will ensure that only competent persons will be appointed to that office. Merely disqualifying certain categories of persons from acting as liquidator, as section 509(1) CAMA does, is a far cry

[15] (1998) 1 F.B.T.L.R P.11 at 34

from the contemporary and more pragmatic approach of specifying the professions from the ranks of which liquidators can be appointed.

This has been adopted in England; where it is an invariable practice of companies wound up for courts to appoint an accountant of not less than five years experience. though the courts have jurisdiction to make an exception,[16] Nigerian courts follow English practice. There is nothing in the law or the rules preventing the appointment of other professionals, the above practice has become a convention. If the law or statute disqualifies a person from occupying a specified position, i.e. conviction, there is the need for a restraining order. This seems imperative; the conviction per se disqualifies the person. A shareholder is also not to be appointed a liquidator as was held in *Re Northumberland and Durham District Bank Co.*[17] A person may be appointed who is already a liquidator to one of many companies which affairs are interlocked.[18]

Appointment of liquidator

In compulsory liquidation, there are two types of liquidators; that is, the substantive liquidator and the provisional liquidator. While the former is appointed after a winding-up order has been made by the court, the latter is appointed at any time after the petition for winding up order has been filed but before the making of the winding up order. However, in most instances, the person who acts as provisional liquidator of a company may also be appointed later as the substantive liquidator of the company.[19] Section 422(2) of CAMA recognizes this practice and accordingly provides for the appointment of a provisional

[16] *Re Ickenield Development Ltd* (1973) ALL ER 168
[17] (1858) 2 DEG & J 508
[18] See *Re Western Life Assuring Society, ex parte Willel* (1870) 5 CH APP 396 and *Re British National Life Assurance Association* (1872) L.R. 14 Eq. 492.
[19] Sales, *The Law Relating to Bankruptcy, Liquidations and Receiverships*, 6th ed. 1977 p. 193

liquidator. The law empowers the court appointing him to limit and restrict his powers ... by the order appointing him.[20] Over the years, the courts in England have established the practice of limiting his responsibilities to collecting and safeguarding the company's property, pending the making of a winding up order when he will be expected to either transfer the said property to the substantive liquidator (if he is not appointed) or deal with same in that capacity (if he is so appointed).

The court in *N.D.I.C. V F.M.B. Ltd*[21] stated that "the liquidator under Companies and Allied Matters Act is clearly defined. Unless a different definition is provided in the law the "liquidator" certainly includes "provisional liquidator. All powers of a liquidator are exercisable by provisional liquidator" during his tenure as such, the distinction is one of temporariness and permanency.

In Nigeria, both the Court of Appeal and the Supreme Court have endorsed this practice in *Anakwenze V. Tapp Industries Limited*[22]*and in Re Provisional Liquidator of Tapp Industries Ltd*[23] respectively. Sales aptly summed up the philosophical basis for the creation of the office of provisional liquidator when he stated that the Court will appoint someone to that office, if there exists some public interest to be protected.[24] In the regard, he observed that the appointment will be made where there exists the danger of the company's assets being

[20] Section 423 of the CAMA authorizes the liquidator to take possession of the company's assets; it does not particularly ascribe this duty to the provisional liquidator probably because the latter is appointed only if necessary as will be so shown presently. See also prov. Liquidator *Tapp. Ind . V . Tapp. Ind.* (1995) 4 NWLR (pt. 393) p 9 at 13.
[21] (1997) 4 NWLR (pt. 50) 519 per Belgore JSC at 530.
[22] (1992) 7 NWLR (pt. 252) 142 at 146
[23] (*Supra*)
[24] Op Cit p193

dissipated by its director or shareholders before the hearing of the petition for winding up or the making of the winding up order.[25]

The foregoing also represents the reason why section 38(3) of the BOFIA authorizes the Governor of the Central Bank in lieu of the Court to appoint the Nigerian Deposit Insurance Company or any other person as provisional liquidator of failed, bank whose licence had been revoked without waiting for the expiration of the fourteen day period within which the said failed bank is required by section 39(f) of BOFIA to file a petition for its liquidation. The difference between the provisional and substantive liquidation is at the time of the appointment. A provisional liquidator by virtue of section 422(2) of CAMA is appointed upon the presentation of winding up petition or at anytime thereafter, but before the order is made. This proposition has also been confirmed by the Court in *Anakwenze V. Tapp Industry Ltd*[26]also in *Gen & Service Ltd V. Thahai Aviation*[27] Section 422(2) of CAMA is also similar to section 135 of the Insolvency Act of 1986[28] which provides that the Court may, at any time after the presentation of a winding up petition appoint a liquidator provisionally. Similarly, in England and Wales, the appointment of a provisional liquidator may be made at any time before the making of a winding up order; and either the official receiver or any other person may be appointed.[29]

The purpose for such an appointment is to preserve the assets of the company with a view to effecting equal distribution pursuant to the contingency of a winding up order.[30] If that

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[25] Ibid
[26] (*Supra*)
[27] (2002) 14 NWLR (pt 686) P. 109 at 110
[28] Which is derived from section 532 of the Companies Act 1985
[29] Section 135 (2) of the Insolvency Act 1986
[30] *Gen & Aviation Service Ltd V Thai Hal Supra* and in *Anakwenze V. Tapp Industry Ltd.* (*Supra*).

contingency fails however, any act done under the appointment remains valid.[31] That notwithstanding, the rights of third parties will not be affected upon the failure of the contingency, that is where the order is not made.[32] A provisional liquidator under this head can only be appointed pursuant to an effective petition already filed and properly before the court.[33]

Who may apply for the appointment of a provisional Liquidator?

The company, a contributor or a creditor may apply by summons to the court for the appointment after the advertisement of a petition for the winding up. The application is supported by an affidavit establishing sufficient grounds for the appointment of a provisional liquidator. The court, if it thinks fit and upon such terms as in the opinion of the court shall be just and necessary, may make the appointment.[34]

Mode of Appointment of liquidator

One of the most important functions of the official receiver is in regard to the first meeting of the creditors and contributories (separately held),[35] for it is at those meetings that nominations are made for the post of liquidator.The official receiver summons these meetings, the purpose of which is to determine whether or not an application is to be made to the court for appointing a liquidator in his place. It is after the meetings have been held and an application made by the official receiver to the court for a date to be fixed for the

[31] See *Re A.B. and C No. 2* (1990) 2 QB 429 CA.
[32] *Re Dry Docks Corporation of London* (1988) 39 CH.D 306 at 314. Also in *Levy V Napier* (1962) SC 468
[33] Se *Re A Company* (1974) 1 ALL ER 256
[34] See Rule 21 of Companies winding up Rules 2001
[35] Section 422 of CAMA and Rule 41 of Companies Winding up Rules 2011

consideration of the resolution and the determination of the meeting where there is a difference.

The separate meetings of creditors and contributories make resolutions for nomination as liquidator, if there is no dispute to be determined by the court. The official receiver will make his report of the two meetings to the court, upon an application to the court for the purpose of appointment or appointments, thereby giving effect to the resolution or determination at the meetings.[36] The court shall then appoint a liquidator, the person appointed also notifies his appointment to the Commission and gives security in the manner prescribed to the satisfaction of the court, otherwise, he cannot act as liquidator.[37] As soon as the liquidator has given security, the Commission causes the notice of appointment to be gazetted but the cost of gazetting is borne by the liquidator who may charge it on the assets of the company. The liquidator may also be directed by the court to advertise his appointment or that of the committee of inspection in such a manner as the court may direct, following the giving of security after the appointment.

Name and Style of Liquidator

Every liquidator must be addressed and called in such a way as to reflect his position as such and of the particular company in question.[38] Thus, the title of liquidator must follow after his name, for example: Alfred Iyoha, Esq., Liquidator of Blessing Nigeria Ltd. If he is also the official receiver, his designation must reflect that fact for example: Alfred Iyoha, Esq., Official Receiver and Liquidator of Blessing Nigeria Limited. The Liquidator must never be

[36] Rule 41 of Companies Winding up Rules 2001
[37] See Rule 41 (5) of Winding up rules 2001, section 422 of CAMA and also *Halsbury's Law of England*, (4th ed), Para 1105.
[38] Section 422 (7) of CAMA

referred to by his individual name only when it is sought to address him in his capacity as liquidator.

Defective Appointment

The validity of acts done by a liquidator may be challenged on a variety of grounds. it may be challenged on the ground that the appointment is defective; or that he had exceeded his statutory powers as liquidator; or that, although he acted within the scope of his powers, he had failed to obtain the necessary approval or sanction for the exercise of that power. The question of the validity of the acts of a liquidator whose appointment or qualification is subsequently discovered to have been defective seems to have arisen principally in relation to liquidators appointed in voluntary winding up.[39] Problems of this kind may also arise in compulsory winding up. As regards the former, the courts have in the past frequently insisted upon strict compliance with the formal requirements with respect to the calling of meetings and passing of resolutions for voluntary liquidation[40] and there had, as a result, been a number of cases where the validity of a liquidator's actions had been questioned on account of failure to observe the necessary formalities.[41]

However, the provision of Section 422(8) of CAMA and Rule 180(2)[42] saved the acts of a liquidator done in good faith even where irregularities and/or defects were afterwards discovered in relation to the manner of appointment or qualification of a liquidator. But where the appointment was void ab-initio, as for instance where a liquidator was purportedly appointed, or where a lunatic, an infant, or ex-convict etc was appointed, it is doubtful if the

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[39] Elikwu Uriah P.I. "*The rights and duties of a company liquidator*" (unpublished LLM Thesis) at Ambrose Alli University, Ekpoma, Edo State 2005.
[40] *Re Bridport Old Brewery Co.* (1867) 2 ch. App. 191
[41] *Re Equitable Insurance Association of New Zealand* (1892) 11 NZLR 605
[42] Companies Winding Up Rules, 2001

provision will save the ensuring acts because, the rule is that a thing which is a nullity cannot support a valid act, for nothing cannot support something for according to Denning.[43]

> If an act is void, then it is in law a nullity. It is not only bad, but also incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without much ado; though it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

This dictum has been followed in a number of cases in Nigeria[44]. Therefore, an act done by a liquidator or a member of the committee of inspection whose appointment is tainted with any fundamental vice such as lack of capacity cannot be saved;

Finally, by virtue of section 510 of CAMA, it is an offence for a person to give or agree or offer to give to any member or creditor of a company any valuable consideration in order to secure his own appointment or nomination or to secure or prevent an appointment or nomination of any other person. The criminal liability for the offence upon conviction is a fine of ₦250. The above section is similar to section 635 and 730 of the Companies Act of 1985 of England.

Status of the liquidator

According to McPherson,[45] the status of the liquidator must be considered in relation to (a) the court (b) the company and (c) the creditors and contributors.

In Relation to the Court

Like a Solicitor or a trustee in bankruptcy, a liquidator in compulsory winding up is an officer of court.[46] This does not mean that he is a servant of the court in the same manner as

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[43] See the Famous dictum of Denning L.J. in *McFoy V. UAC* (1962) AC 152 at 160
[44] See *Erisi V. Idika & Ors* (1987) 18 NSCC (Part II) 210 at 210, *Sken Consult (Nig.) Ltd. V. Ukey* (1981) 12 NSCC. P. 1.
[45] McPherson Op Cit P. 186

a registrar or other court official, for he cannot be directed by the court to act in a manner which is at variance with his statutory duties. But being under the control and discipline of the court,[47] he is required at all times to act in an honest, impartial,[48] and fair-minded[49] fashion, and is directly responsible to the court. A liquidator is subject to the court for direction,[50] this was illustrated by the court in *Anakwenze V. Tapp Industries Ltd*[51] where the court held that a provisional liquidator is an officer of court and as such is subject to the court for direction

In Relation to the Company

In relation to the company, viewed as a corporate entity, the liquidator occupies the position of an agent.[52] This gives him power to bind the company,[53] without personal liability,[54] either with the sanction of the court or of the committee of inspection. The liquidator may by virtue of section 425 (1) (a) of CAMA prosecute or defend any action or bring other legal proceedings on behalf of the company and in the name of the company. In so doing, he acts in much the same way as the directors whose position, he assumes on appointment.

A liquidator has discretion as to whether or not to bring or defend an action. He will like any other public officer on whom a duty devolves, be legally expected to exercise his discretion judiciously and judicially. He cannot, for example, refuse to defend an action, the prosecution of which is necessary for the effectual winding up of the company. The liquidator is required to continue or carry on business of the company, so far as may be

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[46] *Re Dominion Trust Co. Crithely's case* (1916) 27 DLR 580
[47] Ibid
[48] *Re Contract Corporation, Gooch's case* (1871) 7 CH APP 207, 211
[49] In Admitting claims, he must bear in mind the rule in *Ex Parte James* (1874) ach App 609
[50a] *Re David Hamilton & Co* (1928) NZLR 419
[51](1995) 5 NWLR (part 393) 9 at 15
[52] See *Re Angho-Moravian Ryco* (1875) 1 CH 130; *Knowles V. Scott* (1891) 1 CH 717, *Butter V. Broad-Head* (1975) CH 97, 108 p. 187
[53] As held in *Farrow, Bank Ltd* (1921) 2 CH 64
[54] See *Stead Hazel Co. V. Cooper* (1933) 1 KB 840

necessary for the beneficial wound up of the company. Again, he does so as an agent of the company and is, as such, not personally liable on his contract[55]. The court[56] stated that as follows.

> When a liquidator appointed by the court performs a contract of the company without disclaimer or purports to make a new contract on its behalf. There is no presumption that he does so in his personal capacity, even though he does not describe himself as liquidator; and his position in this respect is not altered by section 267 of the Companies Act 1929, which gives him the right to disclaim any contract which he thinks onerous.

However, if he exceeds his clear authority he becomes personally liable on any contract in breach of his implied warranty of authority.[57] He may even become criminally or tortuous liable for possession or occupation of company property.[58] He has power to make a contract on behalf of the company[59] where, in the course of carrying on the company's business under this provision, his indebted. The post-liquidation creditors rank in priority over the pre-liquidation ones.[60] Again, as an agent of the company, the liquidator stands in a fiduciary relationship with the company and this imposes upon him certain fiduciary duties. Like all fiduciary agents, he is prohibited from unconscionable dealings with either the assets or goods of the company.[61] Where in respect to goods, he carries on the business of the company, for example a liquidator sold the undertaking of a company to a new company which really belonged to himself, the sale was set aside for concealment.[62] The liquidator was then held accountable for the secret profit in the transaction for he was analogous to a trustee of the company. This rule also applies to members of the committee of inspection.

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[55] See the dictum of Adedipe J. in Economic *Exports Ltd. V. Kasumu* (1966) NCLR 104 at 107
[56] *Stead Hazel & Co. V. Cooper supra*
[57] *Re Association Travel Leisure & Services Ltd* (1978) 1 WLR 547.
[58] *Meigh V. Wickernden* (1942) 2 KB 160
[59] *Re Anglo-Moravian Hungarian Junction Rly Co. exp Watkin* (1876)
[60] *Re Great Eastern Electric CO. Ltd* (1941) Ch 241
[61] Rule 144 & 145 of Companies Winding-up Rule 2001
[62] See *Silkstone & Heigh Moor Coal CO. Ede* (1900) 1 CH 167

The court will "lift the veil" where the liquidator or any member of the committee of inspection deals with the assets or goods of the company in any manner repugnant to his position as fiduciary. These rules are identical with those applicable to trustee in bankruptcy. From this, it follows that his position is similar to that of the directors to whom he is often likened.[63] Upon his appointment he does in fact displace the directors and assumes many of their functions as stated by the court in *NDIC V. FMB Ltd*.[64] that: Belgore, JSC (as he then was) put it eruditely as follows;

> On the appointment of a liquidator (whether provisional or substantive) under section 422(a) of Companies and Allied Matters Act, the subject company's Board of Directors is automatically supplanted by the liquidator. Thus, from the moment of the liquidator's appointment, all powers of the Board of the company are vested in the liquidator and the Board of Directors thus becomes functus officio[65]. The liquidator is however expected to display a higher degree of skill and care than would suffice for a director.

In Relation to Creditors and Contributories

It is difficult to state precisely the nature of the relationship, which exists between a liquidator and the creditor or contributories of a company in liquidation. It is sometimes said that as regards the property of the company, he is a trustee. However, he is clearly not a trustee in the sense of the Trustee Act of 1925, because the property of the company does not automatically vest in him as does a trust property in trustee.[66] The court may however by virtue of section 424 of CAMA make a vesting order in favour of the liquidator in his official capacity. A liquidator at whose instance a vesting order has been made is not personally liable for onerous burdens passing with the property since the property vests in him in his

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[63] *Samyan v Navigation Co Ltd* (1975) 1 WLR 673
[64] (1997) 4 NWLR Pt 501, 519, per Belgore JSC at pages 530-531 paras F-B
[65] See also *Gen & Aviation Service Ltd. V. Thahal* (2000) 14 NWR (Pt 686) 108 at 120 paras B-L. Also *Financial Merchant bank Ltd. V. Nigerian Deposit Insurance Corporation* (1995) 6 NWLR (pt 400) 226 at 231.
[66] For Instance a Trustee in Bankruptcy

official capacity. He is for instance not liable for rent charges.[67] There are several decisions, which positively deny him the character of a trustee. It has for example, been held that the rate of his remuneration is not governed by fixed scales applicable to trustees.[68]

He is not entitled to the protection afforded by statute[69] for breach of trust,[70] and the right of following or tracing company property which passes through his hands is more limited than it is in the case of property misappropriated by a trustee.[71] The true position is that, like a director, the liquidator is at best a quasi trustee.[72] Although he has some of the rights, duties and liabilities of a trustee[73] he is principally and really an agent for the company who occupies a fiduciary position in some respect and is bound by the statutory duties imposed by CAMA.[74]

The powers of the company liquidator

The powers of a liquidator, whether in compulsory or voluntary winding up, are the product partly of legislative enactment and also of his position as the company's agent in winding up. The issues to be considered here are the nature and extent of these powers, as well as the extent to which acts of the liquidator are invalidated if done in excess of power or without proper authority.

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[67] *Graham V. Edge* (1888) 2 QB 685 CA
[68] *Re Intermountain Building Association* (1942) 3 DLR 779
[69] Section 61 of the Trustee Act 1925
[70] *Re Windsor Steam Coal Co.* (1928) CH 609
[71] Probably the principle of *Laster V. Stubbs* (1890) 45 CH 1 would apply to a liquidator
[72] McPherson Op Cit 188
[73] *Re Windsor Steam Coal Co Supra*
[74] *Thomas Franklyn & CO. V. Cameron* (1935) 36 S.R. (N.S.W.) 286, 296 per Davidson J., unlike a director, whose duties are owed only to the company, a liquidator probably owes his duties as much to the creditors and contributories though they can only be enforced through the company while it is in existence. After dissolution, however, it may be that the liquidator becomes a trustee for individual creditors and contributors. *Re Hills Waterfall Estate Co.* (1896) 1CH 947. His fiduciary duties seem to be due to both the company and to the creditors and contributories.

Upon winding up, the directors of the company are displaced and their functions assumed by the liquidator[75] who, in exercising his powers, acts as the agent of the company.[76] All the normal consequences incidental to the agency relationship are therefore present: his acts[77] and the transactions into which he enters bind the company, not the liquidator personally. This is so whether the company is being wound up voluntarily or compulsorily.

In *Re Farrow's Bank*,[78] the Company was a Lessee of premises under a lease containing a proviso for determination and re-entry in the event of breach of covenant not to assign. The company was put into compulsory liquidation and the liquidator took steps to assign the lease without obtaining the lessor's consent. It was held that this amounted to a breach of covenant by the company since "the act is the act of the company acting through the liquidator who is doing the act which he does strictly on behalf of the company." As stated earlier, no personal liability attaches to the liquidator in respect of acts and transactions performed or entered into in his capacity as agent for the company.[79] Hence, if he enters into a contract on the company's behalf or appoints a Solicitor to assist him in performing his duties,[80] the contract is made with, and the liability fixes upon, the company and not the liquidator, shall be liable since it is to the assets of the company and not to the liquidator personally that credit is given by the other party to the transaction.[81] This appears to be so even though the liquidator fails to describe himself expressly as a liquidator,[82] although some such indication of his representative capacity is a wise precaution if disputes are to be

[75] *NDIC V. F.M.B. Ltd.* (1997) 4 NWLR (Pt. 501) p. 519
[76] McPherson Op Cit p. 212
[77] Including, it would seem, torts committed by him in the course of his duties *Re: Millingen's Ltd* (1934) S.A.S.R. 72 at p.80
[78] (1921) 2 CH. 164 at 175. See also *Cohen V. Restaurants Ltd.* (1917) 1 KB 480
[79] *Re Patrick Plans Free Press Newspaper Co.* (1892) 3 BC (NSW) 49.
[80] *Re Anglo-Moravian Ryco* (1875) 1 CH 130
[81] Ibid, at P. 133. Nor under the general law does the liquidator incur personal liability for income tax by carrying on the business of the company. *Re Benifelfai Mining Co.* (1934) Ch 406, 416
[82] *Stead Hazel & CO V. Cooper* (1933) 1 KB 840, 843

avoided. The rule is the same where he occupies premises of the company for the purpose of the winding up: by so doing, he incurs no personal liability for rent[83] or rates[84] for he occupies them not in his own right but in his capacity as manager and servant of the company.[85]

Although, the powers of a liquidator in compulsory and in voluntary winding up are basically alike, the differences are profound enough to merit separate treatment. According to Emiola,[86] the powers of a liquidator are determined by the mode or circumstances of his appointment. As already noted, the company may by resolution decide voluntarily to wind up its affairs. In such a situation, the liquidator has literally an unlimited freedom in the conduct of the winding up so long as the interest of the shareholders and the creditors are duly protected. Professor Gower observed.[87]

> It is also significant that the Courts place considerable weight on the principle of self-determination in every type of liquidation[88]. The theory that members and creditors are the best judges of what is in their own interest is invoked and although the rules provided for the conduct of meetings, they do little to meet the dangers that the interests of the many may be sacrificed to those of the controlling few.

Powers of a Company Liquidator in Compulsory Winding up

The power of a liquidator in compulsory winding up may be divided into original and delegated powers. By original powers is meant those powers which are conferred upon the

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[83] *Warrender Estates Ltd V. Simpson* (1933) S.R. (N.S.W) 390
[84] *Re Wear Mouth Crown Glass Co.* (1882) 19 CH. D 640
[85] *Warrender Estates Ltd V. Simpson supra* at p. 395
[86] Emiola Op Cit p. 488
[87] Gower Op Cit p. 739
[88] See *Re Industrial Commercial Bank Ltd* (1931) 10 NLR 85, where the court over-ruled the decision of a vast majority of creditors and contributories on the need to maintain "Commercial Morality in Nigeria" also in the *Re Telscriptor Syndicate Ltd* (1903) 2 Ch 174; *Re Hester* (1889) 22 Q.B. D 641

liquidator directly by express provision of the Companies Act. The principal source is section 425 of CAMA, which confers a variety of powers intended to facilitate performance by the liquidator of his duties in winding up. Most of these are directed to specific duties, which he is bound to carry out and may therefore be more conveniently considered in the context of the particular duty to which they relate. But the basic duty of the liquidator is to bring about a complete liquidation of the company and in this connection; there is at least one power, which merits special attention in this context. This is the incidental power contained in the concluding paragraph,[89] of section 425 (2) (h) of the CAMA which authorizes the liquidator to do all such things as are necessary for winding up the affairs of the company and distributing its assets.

Unquestionably, this power is extremely wide; and has been said to cover everything that a reasonable man might consider necessary[90] and empowers the liquidator to do anything which may be thought expedient with reference to the assets of the company,[91] even to the extent of leasing[92] or mortgaging[93] company property or purchasing an asset for the purpose of resale.[94] The liquidator's original powers include: power to sell the property of the company of whatever nature by public auction or private contract, with power to transfer the whole of it to any person or company or sell the same in parcels,[95] power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use the company's seal.[96] The liquidator's powers also include the

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[89] Section 425 (2) (h)
[90] *Re Bairnsdale Food Products Ltd* (1948) V. L.R. 264; Per Fullagar J, at P. 267
[91] *Re Cambrian Mining Co* (1882) 48 L.T. 114 at p. 116, per Kay J.
[92] *Re Premier Permanent Building Soc.* (1890) 16 V. L.R. 643, *Re Federal Bank of Australia* (1895) 6 BC (NSW) 3
[93] *Re Cambrian Mining Co.* (Supra)
[94] *Re Bairnadale Food Products Ltd.* (Supra)
[95] Section 425 (2) (a) of CAMA
[96] Section 425 (2) (b)of CAMA

power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate,[97] power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company,[98] power to raise on the security of the assets of the company any requisite money,[99] power to take out letters of administration to the estate of any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company.[100] The liquidator also has power to appoint an agent to do any business which the liquidator is unable to do himself.[101]

In exercising his powers, the liquidator's act is subject to the control of the court and he is also required to have regard to directions given by the creditors and contributories. Hence the following powers can be exercised only with the sanction either of the court or of the committee of inspection (a) to bring or defend any action or other legal proceeding in the name and on behalf of the company and,[102] (b) power to carry on the business of the company so far as may be necessary for its beneficial winding up.[103] He performs these functions and exercises such powers as the agent of the company.[104] The liquidator's power to appoint a legal practitioner to assist him in the performance of his duties can only be exercised with the prior sanction of the court or of the committee of inspection.[105] He has

[97] Section 425 (2) (c) of CAMA
[98] Section 425 (2) (d) of CAMA
[99] Section 425 (2) (e) of CAMA
[100] Section 425 (2) (f) of CAMA
[101] Section 425 (2) (g) of CAMA
[102] Section 425 (1) (a) and also see *Nigeria Deposit Insurance Corporation V. Obende* (2002) FWLR pt. 116, 921 at 925
[103] Section 425 (1) (b)CAMA
[104] See *Stead, Hazal & Co V. Cooper* (1933) 1 KB 840
[105] Section 425 (1) (c) CAMA

power to pay any classes of creditors in full,[106] and to make any compromise or arrangement with creditors or persons claiming to be creditors or claiming to have any claim against the company;[107] to compromise all calls and liabilities to calls, debts and liabilities and all claims between the company and a contributor. He can deal with all questions relating to the assets or the winding up of the company[108] and to make calls.[109] The power to rectify the register of members by the liquidator may be exercised only with the special leave of the court.

The Delegated Powers

By delegation is meant the delegation of those powers which the Companies and Allied Matters Act confers upon the court but which the court delegates to the liquidator by virtue of the Rules or Regulations. In pursuance to section 453 of CAMA, the exercise of the following powers has been delegated to the liquidator namely the holding and conducting of meetings, to ascertain the wishes of creditors and contributories, the settling of lists of contributories, rectification of the register of members, collecting and applying of assets, requiring the delivery of property or documents to the liquidator, the making of calls and the fixing of a time within which debts and claims must be proved. The liquidator must settle the lists of creditors[110] and hold meetings of creditors and contributories. In exercising these powers, the liquidator acts as an officer of court and is subject to the control of the Court and any creditor or contributory may apply to the court with respect to the exercise of any of the powers.

The liquidator, in exercising those powers enumerated above, is subject to the general supervision of the court and to the wishes of the contributories and creditors, for even in

[106] Section 425 (1) (d) CAMA
[107] Section 425 (1) (e) CAMA
[108] Section 425 (1) (f) CAMA
[109] Section 453 (1) and Rule 69 of Companies Winding up Rules 2011
[110] Rule 63 of Companies winding up Rules 2001

liquidation, the principle of corporate self-determination is respected. It is a fundamental corporate principle that members and creditors are the best judges of what is in their own interests.[111] It is for this fact that the liquidator is obliged to obtain sanction before he makes a call or rectifies the register of members. Sanction to rectify the register is that of the court, whereas either the court or the committee of inspection grants leaves for the making of calls. The procedure in obtaining the court's sanction to make call is stated in the Companies Winding up Rules.[112] The application is by way of summons in Chambers. Where there is no sanction from either the court or Committee of Inspection, the liquidator cannot exercise the power to make calls. If sanction is sought from the committee of inspection and is refused, the court has an inherent jurisdiction to review the decision of the committee and, in doing so; the creditor's claim has first consideration.[113] It seems that a consideration as to whether the existing assets of the company would, without making a call, suffice to satisfy the obligation of the company to its creditors is an important factor for the court in overturning or refusal to overturn the decision of the committee of inspection not to sanction calls.

Powers of a Liquidator in Voluntary Winding-up

In voluntary winding up, the liquidator is authorized by Section 481 of CAMA to obtain a special resolution of the company. In a creditor's voluntary winding-up, he obtains the sanction of the court or the committee of inspection. If there is no committee of inspection, he shall obtain the fiat of the meeting of creditors[114] to pay any classes of creditors in full,[115] to make any compromise or arrangement with creditors or persons having any claim against

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[111] See *Re Agricultural Industries Ltd* (1952) 1 ALL ER 1188, *Re ABC Coupler & Engineering Co. Ltd.* (1961) 1 WLR 243.
[112] See Rules 70 – 73
[113] See *Re North Eastern Insurance CO Ltd* 989
[114] Section 481 (1) (a) of CAMA
[115] Section 425 (1) (d) of CAMA

the company[116], to compromise all calls, debts and all claims between the company and a contributory, and all questions relating to the assets or the winding up of the company. He takes security for discharge and gives a complete discharge in respect thereof.[117]

However, the liquidator may, without sanction, exercise any of the other powers given to him by the Act in a winding up by the Court.[118] These include the following: to settle the list of contributories,[119] to make calls,[120] to summon general meetings of the company for the purpose of obtaining the sanction of the company by special or ordinary resolution or for any other purpose,[121] to pay the debts of the company and adjust the rights of the contributories among themselves,[122] to bring or defend an action in the name of the company,[123] to carry on the business of the company so far as necessary for its beneficial winding up,[124] to appoint a legal practitioner to assist him in the performance of his duties,[125] to sell the property of the company,[126] to act and execute deeds in the name of the company,[127] to prove and receive dividends in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate,[128] to draw, accept and endorse bills of exchange or promissory notes on behalf of the company,[129] to appoint an agent to do any business which the liquidator is

[116] Section 425 (1) (e) of CAMA
[117] Section 425 (1) (f) of CAMA
[118] Section 481 (1) (b) of CAMA
[119] Section 481 (1) (c of)CAMA
[120] Section 481 (1) (d) of CAMA
[121] Section 481 (1) (1) (d) of CAMA
[122] Section 481 (1) (2) of CAMA
[123] Section 425 (1) (a) of CAMA
[124] Section 425 (1) (b) of CAMA
[125] Section 425 (1) (c) of CAMA
[126] Section 425 (2) (a) of CAMA
[127] Section 425 (2) (c) of CAMA
[128] Section 425 (2) (c) of CAMA
[129] Section 425 (2) (d) of CAMA

unable to do himself[130] to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets[131] etc.

According to McPherson,[132] a liquidator in voluntary winding up does not possess any delegated powers in the same sense as those conferred on a liquidator in compulsory winding up. All his powers are original, and the remainder continues to be vested in the court itself. With regard to this, a liquidator in voluntary winding up can apply to the court to exercise any of its powers as if the company was being wound up compulsorily, and this is the proper course to take where there has been no delegation to the liquidator in voluntary winding up. The liquidator must satisfy the court that the exercise of its powers will be just and beneficial,[133] but as was held in *Re Campbell Coverings Ltd*,[134] the fact that the particular power which the court is asked to exercise is expressed in specific language, or is subject to a condition precedent, which is not wholly appropriate to the case of voluntary winding up, will not automatically deprive the liquidator of his right to have that power exercised.

Technical objections of this kind will not be permitted to interfere with the manifest policy of this procedure which is to make available to the liquidator in voluntary winding up all powers which might be exercised in compulsory winding up[135] without incurring the expense of having the company wound up by the court.[136] What can be perceived from the foregoing is that the powers of a liquidator under CAMA as discussed earlier are similar to the provisions of sections 598(2), (3), section 598, 618 of the Companies Act of England 1985 .

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[130] Section 425 (2) (g) of CAMA
[131] Section 425 (2) (h) of CAMA
[132] McPherson Op Cit at p. 216
[133] See *Re Serene Shoes Ltd* (1958) 1 WLLR 1087
[134] (1953) CH 488
[135] *Re Campbell Coverings Ltd* (1953) Ch 488 at 496
[136] *Re County & Marine Insurance Co* (1870) 6 CH App. 104 per James L.J., at p115.

The Nigerian Deposit Insurance Company as a liquidator is also expected to exercise the powers of a liquidator as the court in *NDIC V. FMB*[137] stated thus:

> By section 38(3) of the Banks and other Financial Institutions Decree, the NDIC may be appointed by the Governor of the Central Bank of Nigeria as the official receiver or as a provisional liquidator of a company. When so appointed, the NDIC shall have the powers conferred by or under the Companies and Allied Matters Act and shall be deemed to have been appointed a Provisional Liquidator by the Federal High Court for that purpose. Under Section 452(1)(a) of the Companies and Allied Matters Act 1990 the liquidator shall have power to bring or defend any action or other legal proceedings in the name and on behalf of the Company under liquidation. A provisional liquidator exercises the powers of a liquidator unless limited or restricted by the court.

The court further stated that the NDIC being appointed the official receiver or as a provisional liquidator of a company shall have the powers of a liquidator conferred by or under the Companies Allied Matters Act.

Acts in Excess of a Liquidator's Power

There is remarkably little authority as to the effect of the liquidator exceeding his statutory powers in the course of performing his duties in winding up. Perhaps, this is due to the fact that his powers are widely expressed and have been generously interpreted by the court.[138] But it is consistent with general principles of the law of agency that the company should not be bound where those powers are in fact exceeded by the liquidator.[139] Furthermore, we submit that the notice of the extent of his statutory powers will be imputed to persons dealing with the liquidator who will thereby be disabled from pleading ignorance of his want of

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[137] (1997) 2 NWLR (Pt. 490) 735 at 743

[138] The question is most likely to arise in relation to the liquidator's power to carry on business under section 425(1)(b) of CAMA, in which case, however, the onus of proving that a contract is ultra vire is on the party who alleges this: See *Hire Purchase Furnishing Co. V. Richens* (1880) 20 QBD 387

[139] This seems to have been assumed in *Hire Purchase Furnishing Co. V. Richens supra*

authority.[140] It is however doubtful whether the same can apply, for example, in the case of a provisional liquidator whose powers have been expressly restricted by the court on his appointment.

Failure to Obtain Sanction

In order to exercise certain powers, it is necessary for the liquidator to obtain leave of the court or the approval of the creditors of the company, or the committee of inspection. Such approval should be obtained in advance of the exercise of the power in question, although the court has power to give a retrospective sanction in a proper case of an action taken without the requisite approval.[141] No doubt the need to obtain prior approval is intended to afford some protection against ill-advised or improper actions on the part of the liquidator.

The question however is whether it is necessary to take this protection to the extent of invalidating transactions entered into by the liquidator without the requisite sanction. On this question, several different views have been expressed: According to one such view is that the whole transaction or proceeding is rendered invalid.[142] Another view is that the matter must be determined by applying what is sometimes termed the "indoor Management" rule[143] that is, a person dealing with the liquidator is, in the absence of special circumstances, entitled to assume that all such formalities have been complied with as are necessary to confer authority upon the liquidator.[144] A third and perhaps more widely accepted view, is that absence of the required sanction is a matter which affects only the relationship between the liquidator and the company or its creditors and cannot be made the

[140] *Re Bairne Dale Food Products Ltd* (1948) V. L.R. 264 per Fullagar J. at p. 267
[141] *Re Associated Travel, Leisure & Services Ltd* (1978) 1 WLR 547
[142] *Rendell V. Conroy* (1897) 8 QLJ, 89.
[143] That is the *Rule of Royal British Bank V. Turquand* (1856) 6 E. & B. 327
[144] *Cycle Makers Co-operative Supply Co. V. Sims* (1903) 1 KB 477

subject of objection by a third party.[145] This is the approach which has prevailed in relation to the institution of legal proceedings by the liquidator for which it was formerly necessary to obtain leave or approval,[146] As between himself and the company, the liquidator requires to be authorized before he embarks on litigation, and if he does so without the prescribed authority, i.e. the court may refuse to allow him his costs out of the assets of the company and he may have to pay them himself. But that does not give the person with whom the liquidator is litigating the right to object that the liquidator has not been authorized to institute the proceedings.[147]

Control of the liquidator's powers

A person entrusted with such enormous powers as the liquidator, cannot be left without any check in order to ensure due discharge of his duties. The liquidator is subject to the control of the court, the committee of inspection, the creditors, the contributories and the Corporate Affairs Commission. Section 425(3) of CAMA empowers the court to control the exercise of these powers by the liquidator and, to this end, authorizes any creditor or contributory to apply to it to review the exercise or purported exercise of any of these powers. The Corporate Affairs Commission and the Committee of Inspection, as will be discussed briefly later, are also expected to exercise some form of control over the liquidator. The reason for empowering these other organs to control the liquidator is to ensure that he (the liquidator) does not misuse his powers and by so doing compromise the effective liquidation of the company.

The General Meetings of Creditors and Contributories

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[145] *Ali V. Premier Timber Co.* (1952) (1) SA 689
[146] See *Dublin City Distillery Ltd V. Doherty* (1914) AC 823
[147] Ibid at p. 507

The liquidator, in the administration and distribution of the assets of the company among its creditors must have regard to directions given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection.[148] Section 427(2) of CAMA enjoins the liquidator to summon general meetings of creditors and contributories at such times as the said creditors or contributors may, by resolution at previous general meetings, direct, that a general meeting should be convened. He can also in the alternative be requested in writing to do so by one tenth of the said creditors or contributors. It should be noted that the CAMA envisages that the creditors should hold their general meetings separately from the contributories. This respectful observation of the researcher is premised on the fact that whenever the CAMA makes reference to these two groups of persons for the purpose in focus, it either employs the word "or" which has a disjunctive effect between them,[149] or uses the word "meetings" which is in plural form and therefore refers to more than one meeting.[150] That the creditors and contributories are supposed to hold their general meetings separately is hardly surprising as these are two distinct groups of people with different interests who more often than not regard each other with mistrust and suspicion. A joint meeting might therefore end up without attaining positive result owing to unwieldy and competitive nature of a joint meeting.

The liquidator is enjoined to summon the general meeting of creditors and contributories “for the purpose of ascertaining their wishes.[151] He is also to have regard to directions given by resolution at such general meeting”.[152] Our understanding of this is that the liquidator is merely expected to seek the opinion of the general meetings on a matter but is not bound by

[148] Section 427 (1) of CAMA
[149] Ibid Section 427 (1) and (2) of CAMA
[150] Section 427 (3) (c) and 433 (1) of CAMA
[151] Section 427 (2) of CAMA
[152] Ibid Section 427 (1) of CAMA

their decisions because "regard to directions given at (any) general meeting" at best means "taking the directions given at any general meeting into consideration". Indeed section 427(4) of CAMA supports this interpretation as it authorizes the liquidator to use his own discretion in the management of the estate (of the company) and its distribution among the creditors.

From the foregoing, it is clear that the general meeting of the creditors and contributories generally does not have any discernible power to control the activities of the liquidator. The only instance when the meetings ought to have some relevance is when the official receiver, acting as provisional liquidator, is compelled to carry out decisions that an application should be made to the court for the appointment of someone other than him (the official receiver) as substantive liquidator. At best, what the CAMA has done in these two major interest groups in a compulsory liquidation is to infuse in them a sense of commitment in the liquidation process by requiring the liquidator to do no more than consult them before taking a decision on the administration and distribution of the assets of the company.

Justifying the relevance of these general meetings, McPherson[153] suggests that if the liquidator seeks and obtains their approval before taking action on a matter, the said approval will operate to exclude him from a charge of negligence and misfeasance in respect of his action in that regard. With due respect, we submit that we disagree with that view, because the liquidator who is usually a Lawyer or a Chartered Accountant will certainly be guilty of professional negligence if, in compliance with the wishes and directives of the general meetings, he does an act, which is manifestly inconsistent with the standard of practice expected of him by his profession. After all, a professional is expected to discharge his duty

[153] McPherson Op Cit p. 202

not necessarily according to the dictates of his client but in line with the practicing standards set by his profession.

The Committee of Inspection

The number of the creditors and contributories may be large and therefore make general meetings unwieldy. A way of getting rid of this problem according to Nwokoro[154] is to appoint a committee of inspection which will consist of some of the creditors and contributories or their agents.[155] Accordingly, CAMA[156] authorizes the general meetings of creditors and contributories summoned by the official receiver under section 422(3) (c) CAMA to also decide whether or not an application should be made to the Court for the Committee of Inspection to be appointed. The foregoing implies that the Committee is supposed to be an agency of the general meeting of creditors and contributories; a fact underscored by section 427(1) of CAMA which unequivocally states that in the event of a conflict between directives given by the general meetings and by the committee of inspection, those given by the general meetings shall override those of the Committee.

CAMA is silent on what will be the position if only one of the general meetings (either of the creditors or the contributories and not both) decides that the application for the appointment of the Committee of inspection should be made. It is submitted that in such a situation upon

[154] Nwokoro Op Cit at 262
[155] Section 434 (1) of CAMA
[156] Ibid 434 (i) of CAMA

the application of a concerned party, the Court will be required to resolve such deadlock by making a pronouncement on whether or not it will appoint the committee.

Quite unlike the position with the general meetings of creditors and contributories, which are merely consultative bodies, the CAMA intends that the committee of inspection should be closely involved with the liquidation process. It is against this background that section 425(1) 312 of CAMA requires it to approve the exercise of certain powers by the liquidator.[157]

It is my submission from the foregoing that the committee of inspection has more relevance to the liquidation process than the general meetings of creditors and contributories as quite unlike the latter, it is conferred with the power to exercise some measure of control over the liquidator in the performance of his duties.

The Corporate Affairs Commission

The Corporate Affairs Commission was created under section 1 of CAMA. It regulates the incorporation, running and winding up of companies, business names and incorporated trustee, pursuant to CAMA.[158] In carrying these duties, it possesses the enabling power enshrined by law to assist its carrying out its functions.

The Corporate Affairs Commission

Section 7(1) of CAMA empowers the Corporate Affairs Commission (CAC) to "regulate and supervise the winding up of companies" the extent of this mandate is supported by section 422(3)(d) of CAMA, which stipulates that any person other than the official receiver who is

[157] CAMA
[158] *All States Trust Bank V Chyke Int'l Ltd* (2003) FNCR pt 141 1903 CA 20

appointed liquidator of a company shall not be capable of acting in that capacity until he has notified the commission of his appointment.

In other words, the liquidator is expected to be under the control of the CAC. Section 432 of CAMA also strengthens this position by authorizing the commission to take cognizance of a liquidator's conduct and to enquire in matters of his misconduct on his part, hence the commission is again empowered to take any step it considers necessary including the investigation of the liquidator's book and vouchers, coupled with the examination of the liquidation or any other person under Oath.

Duties and Powers of the Corporate Affairs Commission

As provided in section 7 of CAMA, the Commission's duties include.

(1) To administer the Act, including the regulation and supervision of the formation, incorporation, management and winding up of companies.[159] To establish and maintain company registries and offices in all states of the federation suitably and adequately equipped to discharge its functions under the Act or any law in respect of which it is charged with responsibility;

(2) Arrange and conduct investigations into the affairs of any company, where the interests of the share holders and the public so demand

(3) To perform such other duties, as may be specified by any act or enactment.

(4) To undertake such other activities as are necessary or expedient for giving full effects to the provisions of the Act. It is worthy of note to indicate, that the commission has offices in all the states of the federation.

Power of the Commission

[159] Kenna & Associate "*Establishing enterprises in Nigeria; the legal framework*," at www.ken&associate.com.on 15th December 2013.

(1) Regulation and supervision of the formation of companies, Business names and incorporated Trustees.

(2) Incorporation and Regulation of companies, Business name and incorporated Trustees Management and winding up of companies[160]

(3) Maintaining company Registries.

(4) Investigation into the affairs of companies.[161]

Section 7(1) (a) of CAMA authorizes the Corporate Affairs Commission to "regulate and supervise the winding up of companies". The scope of this mandate is underscored by Section 422(3) (d) of CAMA, which states that any person other than the official receiver who is appointed liquidator of a company shall not be capable of acting in that capacity until he has informed the Commission of his appointment. The implication of this provision is that the liquidator is expected to be under the control of the commission. Section 432 of CAMA[162] further consolidates this position by authorizing the Commission to take cognisance of a liquidator's conduct and to inquire into cases of misconduct on his part, for this purpose, the Commission is further empowered to take any action it deems fit including the local investigation of the liquidator's books and vouchers - and the examination of the liquidator or any other person on oath.

The commission's control over the liquidator is particularly tightened with respect to his (the liquidator's) handling of money, which ought to be applied to the liquidation of the company. The essence of this arrangement is to eliminate the possibility of such funds being misappropriated by the liquidator. Section 428(1) CAMA requires the liquidator to pay any

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[160] *All States Trust Bank Limited V Chyke Int'l Limited* (2003) FWLR (PT.141) 1903 C.A, *Nigerian National Petroleum Corporation V Lutin Investments Limited* (2006) All FWLR (PT 301) 1760 SC.

[161] section 310 (1) (d), Section 311, section and 314 CAMA

[162] CAMA

money he receives into a special account known as the "Companies Liquidation Account" which is jointly controlled by the Commission and the Accountant-General of the Federation[163]. Section 428(2) of CAMA also stipulates that a liquidator should not retain an amount above ₦500.00 for more than ten days. It is expected that within this period the liquidator would either have lodged the sum into the account being operated for the liquidation or paid it out to any person to whom it is due.[164] Non-compliance with this stipulation and failure to satisfy the Commission that the retention was made in good faith makes the liquidator liable. Section 429(1) CAMA also requires the liquidator to send to the Commission an account of all monies received and paid out by him at prescribed intervals, which should not be less than twice a year. The Commission in turn will audit the account.

The fact that the liquidator has completed the distribution of the Company's assets among the prescribed persons, has resigned or has otherwise been removed from office will not automatically operate to release him from the responsibilities of that office for Section 431(2) of CAMA requires the Commission to make an order to that effect only after satisfying itself that the liquidator's accounts are in order and that there is no objection by any interested person to his being released. The decision of the Commission to release or not to release the liquidator is however subject to an appeal to the court.

The Corporate Affairs Commission has been shown to have been ascribed the very important role of supervising and controlling the liquidator especially in relation to his handling of money which is supposed to be applied to the liquidation of the company. In carrying out this duty, the Commission also becomes quite central to the effective

[163] Rule 171 of Companies Winding up Rule 2001, the Accountant General is expected to issue the liquidator with a certificate of receipt for any payment he makes into the accounts.
[164] Section 428 (3) of CAMA

implementation of the policy of disclosure or publicity as the liquidator will be required to make certain returns to the commission which, upon being filed in its records, become public documents which are open to inspection by anybody upon payment of the prescribed fee.

It is discouraging however, that the commission presently has its focus primarily on the incorporation of companies from where it generates a substantial part of its income. It is also a known fact that the commission is very poor at keeping records. With the increasing incidence of the liquidation of companies, the commission will have to be more conscious of its responsibilities in that regard.

The Court

The Court is the forum through which the entire compulsory liquidation process is initiated.[165] It is also the court that makes the order for the winding up of the company as well as its dissolution after its affairs have been wound up;[166] the court plays a key role in the appointment of persons who will run some of the other organs of liquidation. In view of this, it is not surprising that the court also supervises the activities of some of these organs, especially the liquidator. The role of the court in this regard was clearly illustrated in the recent case of *Finance and Leasing Co. Limited V. The Nigeria Deposit Insurance, the United Commercial Limited and (in liquidation) The Inspector General of Police*.[167]

The facts of the case are as follows: In 1991, the plaintiff/applicant and the first defendant/ respondent, the United Commercial Bank Limited, signed a three year equipment leasing agreement under which the latter leased seven cars from the former. Upon the latter being declared a failed bank and having had its operating license revoked, the stage was set for its

[165] This is affected by filling the winding up petition
[166] Section 422(1), (2) and (3) of the CAMA
[167] Suit No. FHC/L/CS/707/95

liquidation under section 38 of the BOFIA as a result of which the 2nd defendant/ respondent, the NDIC was appointed its liquidator. The plaintiff/applicant proceeded to repossess the leased cars whereupon the NDIC in its capacity as liquidator of the United Commercial Bank Limited wrote to the former requesting that the cars be handed over to it as they formed part of the assets of the said bank. The plaintiff/ applicant therefore instituted this action, praying the court to make an order prohibiting the defendant/ respondent from relieving it of possession of the seven cars through whatever means. After the knowledge that the NDIC was entitled to act as liquidator of the United Commercial Bank Limited in this case and that the relevant provisions of the BOFIA must be read in conjunction with the CAMA, the court ruled that by virtue of section 453(3) of CAMA which authorizes it to control the liquidator in the exercise of his powers, it could give directive to the NDIC as to how to exercise its powers as liquidator of the United Commercial Bank. It therefore made the following orders:

a) The plaintiff/applicant should restore the seven cars to the possession of the NDIC.

b) Since section 425(d) and (e) permit a liquidator to either pay creditors' debts in full or to compromise same, the NDIC should post and file in court an undertaking to indemnify the plaintiff/applicant to the full extent of any judgment sum which may be awarded it at the end of proceedings.

c) As an alternative to delivering the vehicles to the NDIC, should the plaintiff/applicant so prefer, it may retain possession of same but file in court an undertaking drawn on a reputable bank or insurance company to the full value of the seven vehicles and in the name of the NDIC. The plaintiff/

applicant was given 7 days from the date of the order to exercise this option, after which he must file an affidavit of compliance.

What is most instructive about this ruling is the fact that the court could have simply only ordered that the seven vehicles be returned to NDIC but drawing from the authority conferred upon it by the CAMA to control the liquidator in the exercise of his powers and to generally supervise the liquidation process with a view to ensuring that it is fair to every interested party, the court proceeded to make additional orders which protected the interest of both the United Commercial Bank Limited as Lessee of the vehicle and the plaintiff/ applicant as lessor of the vehicles. This case therefore demonstrates the willingness of our courts to carry out their supervisory functions effectively in relation to the liquidation process. The liquidator may also apply to court for directions in relation to any matter arising under the winding up.[168] Any person who is aggrieved by any decision of the liquidator may apply to the court for such order as it thinks just.[169] In the exercise of his powers, the liquidator is subject to the control of the court and any creditor or contributory may apply to the court with respect to the exercise of any of the powers.[170] From the above analysis, it is clear that the court plays a vital role in controlling the liquidator's power.

However, 1 submit that the major demerit in the role ascribed to the court in liquidation process is that the concentration of a lot of responsibilities on it, with a view to protecting the credibility of the entire liquidation process tends to make the process circuitous as anybody who wishes the court to exercise any of its powers must make an application to it in that

[168] Section 427 (3) of CAMA
[169] Ibid Section 427 (5) of CAMA
[170] Section 425 (3) of CAMA

regard.[171] It is therefore submitted that this has made the compulsory liquidation process as excessively dilatory and expensive.

It is clear that the general meetings of creditors and contributories are merely ceremonial in status, that the numbers of the committee of inspection are likely to work at cross purposes with each other that the corporate affairs commission need to change its work approach and that the court proceedings slows down the process. The implication is that each of the principal agencies of the liquidation process has a vital impact which has the effect of compromising the need for quick action to enhance efficacy of the whole process.

[171] The CAMA tries to minimize this problem by allowing for some of these general powers to be delegated to the liquidator who is expected to exercise same as an officer of the court. The powers which are subject to this arrangement are listed out in section 453 and include setting the list of contributors, rectifying the register of members, making calls on contributories and fixing the time period within which creditors must prove their claim. However, it is submitted that this does not have the effect of substantially reducing the involvement of the court in the liquidation process as the liquidator will exercise these powers subject to the supervision of the court