Pre-Incorporation Contracts in Nigeria: The Need for Progressive, Expansive, and Less Restrictive Statutory Provisions

OLUMIDE KOLAWOLE OBAYEMI *

I. ABSTRACT

With the August 7, 2020 introduction of the Companies and Allied Matters Act of 2020 (CAMA 2020) in Nigeria, the tension between preserving confidentiality of the company as opposed to protecting innocent third parties, that has dominated the focus of laws regulating "Pre-Incorporation Contracts" under contemporary company law regimes, remains unresolved—necessitating further elaboration. Therefore, this paper discusses the goal of protecting innocent third parties who may not know that they are contracting with a corporation that either does not exist or may not come into existence at all. Further, along with the need to protect the company, the paper also critiques the legal effect of standard disclaimers and jurisdictional issues, e.g. under section 21(4) of the Ontario *Business Corporations Act*, or section 14(4) of the *Canada Business Corporations Act*, respectively, which provides some protection against personal liability in favour of the promoters. The paper submits that section 96 of CAMA 2020 is "dead on arrival" as it is outdated, restrictive, and archaic in light of the progress made under other commonwealth regimes. Using current jurisprudence and statutes on pre-incorporation contracts, the paper identifies areas which require reform under Nigerian law and provides appropriate suggestions.

* Department of Commercial & Industrial Law, Faculty of Law, University of Lagos, Akoka, Yaba, Lagos. (E-mail: obayemilaw@yahoo.com/Mobile: + 234 (0) 818 571 8484).

II. INTRODUCTION

It has been noted that the goal of company law is to encourage entrepreneurship and enterprise efficiency, create flexibility and simplicity in the formation and maintenance of companies, and to provide for the creation, role, and uses of companies in a manner that enhances economic welfare of the citizenry.[1] Whether corporate rules governing the status of "Pre-Incorporation Contracts"[2] (aka "Pre-Registration Contracts")[3] in Nigeria serve the above goals remain to be decided. Generally, corporate law statutes provide that a Company[4] does not come into existence until its certificate of incorporation has been issued by the appropriate government agency. *Prior* to this Promoters[5] may enter into pre-incorporation contracts with Third Parties[6] for the company's smooth transition:[7]

> However, in many cases; promoters (individuals who are in the process of incorporating a company or who intend to do so) may find it necessary or desirable to enter into contracts with third parties on behalf of the corporation prior to its incorporation. Such contracts may include leasing or purchasing real property and equipment, hiring key employees, arranging financing, lining up suppliers, or locking-in clients.[8]

---

1 See generally Maryke Alletta Boonzaier, *Pre-Incorporation Contracts and the Liability of the Promoters*, (LLM Dissertation, University of Pretoria, Faculty of Law, 2010) [unpublished] at 3.

2 MA Maloney, "Pre-Incorporation Transactions: A Statutory Solution?" (1985) 10 Can Bus LJ 409; J.S. Ziegel, "Promoter's Liability and Pre-incorporation Contracts: Westcom Radio Group Ltd. v. Maclsaac" (1990) 16 Can Bus LJ 341.

3 See ss 131, 132, and 133 (Part 2B.3) of the *Australia Corporation Act* 2001/50, (Cth) [ACA].

4 In this paper, the words "Company/Companies" and "Corporation/Corporations" are used interchangeably.

5 Sometimes referred to as Agents or Trustees.

6 Usually an Investor or the other contracting party with whom the Promoter contracts on behalf/for the benefit of the proposed Company.

7 *Companies and Allied Matters Act*, 2020, s 42 [CAMA 2020]; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s 9 [CBCA]; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s 7 (BCA); *Alberta Business Corporations Act*, S.A. 1981, c. B-15, s 9(1) [ABCA]; *British Columbia Company Act*, R.S.B.C. 1996, c. 62, s 12; Poonam Puri, "The Promise of Certainty in the Law of Pre-Incorporation Contracts" (2001) 80: 3 Can Bar Rev 1051 at 1051 [Puri].

8 Puri, *Ibid*.

In Nigeria, reform is essential and fundamental. Recently, there has been a substantial increase in the ease and speed in which investors can register a company due to the use of shelf companies[9] and the ability to register a company online. Despite the rising use of online company registration, pre-incorporation contracts are still widespreadly used., Most people register companies online and are able to use it almost immediately subject to name availability, however, not everyone choses to do so.[10] The law on "pre-incorporation contracts" traditionally involves a confluence between company and agency law rules,[11] and struggles to identify, protect and promote the conflicting interests of the companies, third parties, and promoters. Thus, the regime of pre-incorporation contracts has generated conflicting and controversial interests, including: balancing the interests and/or protection of the company, promoter, and third parties, e.g., what happens when a pre-incorporation construction contract is made in the name of a company which did not do the work, and then a construction lien is filed in the name of the company that was later incorporated and did the work?[12] This was the situation faced by the Alberta Court of Appeal in *Canbar West Projects Ltd v. Sure Shot Sandblasting & Painting Ltd.*[13] Other issues involve treatment of deposits and/or part-payment in purchase-sale

---

9 A shelf corporation, shelf company, or aged corporation is a company or corporation that has had no activity. It was created and left with no activity – metaphorically put on the "shelf" to "age", online: <en.m.wikipedia.org/wiki/Shelf_corporation> [perma.cc/QNS5-NNHJ].

10 John Wojtowicz, "Enforceability of Pre-Registration (Pre-Incorporation) Contracts" 531 Law Central Legal, 20 March 2018. Available at: michaellawgroup.com.au/entering-contracts-before-australian-company-registration/. Accessed on August 22, 2020. (Wojtowicz).

11 *Kelner v Baxter*, (1866) LR 2 CP 174; *Newborne vs Sensolid Ltd.*, (1954) 1 Q.B. 45; *Black vs Smallwood*, (1967-68) 11 CLR 52.

12 Thomas Heintzman, "Can A Construction Lien Be Based On A Pre-Incorporation Contract?" (1 May 2011), online: *Construction Law Canada* < www.constructionlawcanada.com/building-contracts/can-a-construction-lien-be-based-on-a-pre-incorporation-contract/http://www.constructionlawcanada.com/building-contracts/can-a-construction-lien-be-based-on-a-pre-incorporation-contract/> [perma.cc/X3FV-KNWZ] [Heintzman]; Scott Wolfe Jr, "What If Company Name On Lien Is Different Than Name On Construction Contract?" (23 May 2011) online: *Level Set* <www.levelset.com/blog/what-if-company-name-on-lien-is-different-than-name-on-construction-contract/> [perma.cc/J9LJ-8QXX] [Wolfe].

13 (2013) ABQB 292 [*Canbar*].

land transactions,[14] and the conflicting decisions in *Westcom Radio Group Ltd, v. Maclsaac*,[15] and *Szecket v. Huang*[16] which have also underlined the problems and issues encountered in this regard:

> Pre-incorporation contracts are a necessity in the business world, but the law on pre-incorporation contracts has been continuously plagued with difficulties. The *Szecket* decision successfully resolves issues regarding promoters' liability by rejecting the *Westcom* intentions analysis and clarifying the requirements for waivers of liability; unfortunately, it leaves for another court the resolution of the pressing issue of which jurisdiction's laws apply when a corporation does not come into existence.[17]

Further, Easson and Soberman had also noted that:

> The conundrum of the pre-incorporation contract has taxed some of the finest legal minds. If one should judge by results, it is probably true to say that it has defied them . . . courts in England and other Commonwealth countries have seemed to attach less importance to effecting justice and more to attempting to fit round pegs into square legal pigeon-holes, so that ultimately, in virtually all jurisdictions, it has been necessary to rescue the lawyers from the dilemma that their own fictions have created by having recourse to legislative solutions.[18]

Similarly, Justice Borins of the Ontario Court of Appeal in *Sherwood Design Services Inc.v.872935 Ontario Limited*[19] held that the law of pre-incorporation contracts "at first blush, may appear to be disarmingly simple, but which, after an examination of the common law, legal treatises and legislative attempts to find an equitable solution to a seemingly insoluble legal problem, is very complex."[20]

Although Nigeria, within the last thirty years, has twice attempted to provide a modern and progressive company law statute aimed at removing the shackled and strictures of old common law rules, a comparative review of extant Nigerian company law rules compared to similar Commonwealth

---

14 *Benedetto v. 2453912 Ontario Inc.*, 2019 ONCA 149.

15 (1989), 70 OR (2d) 591, 63 DLR (4th) 433 (Div. Ct.) [*Westcom*].

16 (1998), 42 OR (3d) 400, 1 DLR (4th) 402 (C.A.) [*Szecket*].

17 Puri, *supra* note 7 at 1064.

18 AJ Easson & DA Soberman, "Pre-incorporation contracts: Common law confusion and statutory complexity" (1992) 17 *Queen's Law LJ* 414 at 415, quoted with approval by Borins JA in *Sherwood Design Services Inc v 872935 Ontario Ltd.* (1998), 39 OR (3d) 576, 158 DLR (4th) 440 (Ont. CA) at para 58 [*Sherwood*].

19 *Sherwood, Ibid.*

20 *Ibid* at 93.

jurisdictions clearly shows that the Nigerian situation is outdated, restrictive, unwieldy, unresponsive to global development, and does not measure up to global best practice. Consequently, this paper attempts to highlight the deficiencies in the Nigerian legislation towards achieving optimal results for all stakeholders, and also critiques the underlying policy considerations behind section 96 of CAMA 2020 towards providing a complete, modern and comprehensive solution to the multitude of practical problems to which outdated Nigerian pre-incorporation law rules continue to give rise to. The paper attempts to balance the conflicting rights and liabilities of the company, promoters, and third parties, and examines the propriety of proposing a statutory *implied dual warranty* by the promoter that the company will not only be incorporated but will also will ratify the pre-incorporation contract.[21] Further, by borrowing from Canada, South Africa and Australia, this paper makes proposals as to the rights of the parties in the interval between the execution of a pre-incorporation contract and the ratification by the company of the pre-incorporation contract.[22]

Part 1 of this Comment is this introductory part. Part 2 provides the definition and nature of pre-incorporation contracts. It specifically sets out the contents of company law statutes in Nigeria, Ontario (Canada), Australia and South Africa, with a comparative insight into their similarities and differences. Part 3, 4 and 5 discuss the statutory protection provided to the third parties, companies, and the promoters, by discussing their historical, policy and judicial interpretation. Part 6 analyses the conflict of laws controversies surrounding oral and un-executed written pre-incorporation contracts. Part 7 is the conclusion, which reiterates the defects under Nigerian statutes, with suggestion for reform of CAMA 2020.

---

21 Maleka Femida Cassim, "Pre-Incorporation Contracts: The Reform of Section 35 of the Companies Act" 124: 2 South Africa LJ 364 at 366 [Cassim]; See also ACA, *supra* note 3 at ss 131–133; Zealand *Companies Act* 1993, at ss 182–184.

22 Cassim, *Ibid* at 366.

III. DEFINITION AND NATURE OF PRE-INCORPORATION CONTRACTS

Neither the recent August 7, 2020 Nigerian Companies and Allied Matters Act (2020) (CAMA 2020),[23] nor the *repealed* Companies and Allied Matters Act of 1990 (Repealed CAMA),[24] *expressly* defines a "pre-incorporation contract." Similarly, Nigerian decisions on the subject, such as *Edokpolo vs Sem-Edo Wire Industries Ltd.*,[25] *Malilu Nigeria Limited v. Mai Ulu Nigeria Limited*,[26] *Garba vs K.I.C. Ltd*,[27] *E.T. & E.C (Nig) Ltd vs Nevico Ltd*,[28] *Societe Generale Favourise Le Development du Commerce et de L'Industre en France vs Societe Generale Bank (Nig) Ltd*,[29] and *Goldmark Nigeria Limited & Ors v. Ibafon Company Limited & Ors*[30] are also not very helpful. The meaning of a pre-incorporation contract is *included* under section 96(1) of CAMA 2020, which begins thus:

> (1) Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company ***prior to its formation*** may be ratified by the company.... (emphasis added)[31]

Therefore, *Kelner v Baxter* and its progeny relating to pre-incorporation contracts will not be applicable where a company has been incorporated before the contract is made or has validly ratified it,[32] an issue firmly decided in *Commonwealth Bank of Australia v Australian Solar Information Pty Ltd.*[33] However, for ease of reference, this paper adopts the working definition

---

23 CAMA 2020, *supra* note 7 was signed into law on August 7, 2020.

24 *Companies and Allied Matters Act* (Nigeria), Ch 59 of 1990, later re-consolidated as the repealed Companies and Allied Matters, Act Cap 20, Laws of the Federation of Nigeria (LFN), 2004 (the Repealed CAMA).

25 (1984) N.S.C.C. 553.

26 (2019) LPELR-47688(CA) 33-35, paras D-C.

27 (2005) 5 NWLR (Pt 917) 16.

28 (2004) 3 NWLR (Pt 860) 327.

29 (1997) LPELR-3083(SC).

30 (2012) LPELR-9349(SC) 55, paras B-E.

31 CAMA 2020, *supra* note 7, s. 96(1)

32 Wojtowicz, *supra* note 10.

33 (1986) 11 ACLR 380.

provided under section 71 of the South Africa's Companies Act 71 of 2008:[34]

> A pre-incorporation contract is an agreement entered into before the incorporation of a company by a person who purports to act in the name of, or on behalf of, the company, with the intention or understanding that the company will be incorporated and will thereafter be bound by the agreement.[35]

From this definition, two (2) issues clearly arise:

1) The distinction in *Kelner v Baxter*, *Newbourne vs Sensolid Ltd*, and *Black v Smallwood* as to how the promoter signed the pre-incorporation contract is no more of relevance, i.e., whether the promoter was acting in the name of the company or on behalf of the company—he will always be an Agent of the Company; and
2) The focus is now on the ***intention or understanding*** that the company (a) will be incorporated and (b) will thereafter be bound by the agreement.[36]

Thus, in *Commonwealth Bank of Australia*, the court ruled that pre-incorporation contract law is not applicable when a shelf company was used to enter into a contract before the shelf company was renamed to suit the business purpose, since incorporationpre-dates the contract.

In Nigeria, similar to *abrogated* section 72 of the *repealed* CAMA, extant section 96 of the CAMA 2020 provides that:

> (1) Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto.
> (2)Prior to ratification by the company, the person who purported to act in the name of or on behalf of the company shall, in the absence of express agreement to

---

34 South Africa's Companies Act 71 of 2008. The purpose of this Act in South Africa was to encourage entrepreneurship and enterprise efficiency, to create flexibility and simplicity in the formation and maintenance of companies, and to provide for the creation, role, and use of companies in a manner that enhances the economic welfare of South Africa. The South Africa Companies Act 2008 also introduced an extensive and renewed approach to the regulation of pre-incorporation contracts towards addressing the shortcomings in the South African company law jurisprudence. It was signed into law on April 8th, 2009 and has April 2011 as the proposed date of coming into effect.

35 *Ibid* at s 1.

36 *Szecket*, *supra* note 16.

the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.[37]

From the above, sub-section (1) of section 96 of CAMA 2020 evinces the following:[38]

- it gives the new company the ***discretion*** of deciding whether to ratify and accept a pre-incorporation contract;
- it also expunges the distinction in *Kelner v Baxter* and *Newbourne vs Sensolid Ltd*, as to how a promoter signs a pre-incorporation contract (which is now of no relevance);
- it applies to all contracts and transactions executed prior to formation of the company; and
- the benefits and liabilities on the pre-incorporation contract fall on the new company after ratification.[39]

In addition, sub-section (2) of section 96 CAMA 2020 shows that:

- it seeks to protect a ***bona fide*** third party who was not aware of the promoter's lack of authority, by providing remedy for the injured third party, who may recoup under the contract from the promoter if, after incorporation, the company does not ratify the contract;
- the injured party can recoup under the contract from the promoter if the company eventually does not come into existence; and
- it requires the consent of the third party to any later post-incorporation agreement or resolution by the new company, not to ratify which also seeks to absolve the agent from liability.[40]

Also, at first glance, the above is clearly restrictive when compared with contemporary corporate law rules on pre-incorporation contracts which are now very flexible and expansive while containing clear provisions meant to protect the company, the promoters and the third parties. For instance, in

---

37 CAMA 2020, *supra* note 7 at s 96(1)&(2).

38 C.K. Agomo, "The Status of Pre-incorporation Contracts," in E.O Akanki, ed, *Essays On Company Law* (Lagos, Nigeria: University of Lagos Press, 1992) at 8 [Agomo].

39 Curiously, the phrase "adoption" was not used in the legislation. This was the word used in the Nigerian seminal case of in *Edokpolo vs Sem-Edo Wire Industries Ltd.* (1984) N.S.C.C. 553.

40 Agomo, *supra* note 37 at 83.

Ontario, Canada, section 21 of the *Ontario Business Corporations Act (OBCA)*[41] states thus:[42]

> **21** (1) Except as provided in this section, a person who enters into an oral or written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof. R.S.O. 1990, c. B.16, s. 21 (1).
>
> **Adoption of contract by corporation**
>
> (2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption,
>
> (a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and
>
> (b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract. R.S.O. 1990, c. B.16, s. 21 (2).
>
> **Assignment, etc., of contract before adoption**
>
> (2.1) Until a corporation adopts an oral or written contract made before it came into existence, the person who entered into the contract in the name of or on behalf of the corporation may assign, amend or terminate the contract subject to the terms of the contract. 2011, c. 1, Sched. 2, s. 1 (5).
>
> **Non-adoption of contract**
>
> (3) Except as provided in subsection (4), whether or not an oral or written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit. R.S.O. 1990, c. B.16, s. 21 (3).
>
> **Exception to subs. (1)**
>
> If expressly so provided in the oral or written contract referred to in subsection (1), a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof. R.S.O. 1990, c. B.16, s. 21 (4).

The above is almost identical under section 14 of the *Canada Business Corporations Act (CBCA*[43] except for the express reference to "written" contracts under sub-section (1). Thus, in contrast to the O.B.CA., section

---

41 OBCA, *supra* note 7 at s 21; CBCA, *supra* note 7 at s 14.

42 *Benedetto*, *supra* note 14.

43 CBCA, *supra* note 7 at s 14.

14 of the C.B.C.A. deals only with *written* pre-incorporation contracts (as opposed to "an oral or written contract" under Section 21 of OBCA), and so it is therefore conceivable that a valid waiver of liability by the promoter must be in writing to meet the standards of the CBCA.

Similarly, section 131 of the Australia Corporations Act of 2001 (ACA)[44] provides as follow:

> **(1) [Pre-registration contract binding]**
> If a person enters into, or purports to enter into, a contract on behalf of, or for the benefit of, a company before it is registered, the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract:
> (a) within the time agreed to by the parties to the contract; or
> (b) if there is no agreed time—within a reasonable time after the contract is entered into.[45]
>
> **(2) [Liability for non-performance]**
> The person is liable to pay damages to each other party to the pre-registration contract if the company is not registered, or the company is registered but does not ratify the contract or enter into a substitute for it
> within the time agreed to by the parties to the contract; or
> (a) if there is no agreed time—within a reasonable time after the contract is entered into.
> (b) The amount that the person is liable to pay to a party is the amount the company would be liable to pay to the party if the company had ratified the contract and then did not perform it at all.
>
> **(3) [Recovering against pre-registration company]**
> If proceedings are brought to recover damages under subsection (2) because the company is registered but does not ratify the pre-registration contract or enter into a substitute for it, the court may do anything that it considers appropriate in the circumstances, including ordering the company to do 1 or more of the following:
> (a) pay all or part of the damages that the person is liable to pay;
> (b) transfer property that the company received because of the contract to a party to the contract;
> (c) pay an amount to a party to the contract.
>
> **(4) [Non-performance of pre-registration contract]**
> If the company ratifies the pre-registration contract but fails to perform all or part of it, the court may order the person to pay all or part of the damages that the company is ordered to pay.

---

44 ACA, *supra* note 3 at s 131.

45 ACA, *Ibid* at s 131(1), the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract within the agreed time period or, if no time was agreed upon, within a reasonable time after the contract was entered into. (emphasis added).

Further, section 132 of the ACA1 provides this:

> **132 Person may be released from liability but is not entitled to indemnity**
> **(1) [A party to contract may release company from liability]**
> A party to the pre—registration contract may release the person from all or part of their liability under section 131 to the party by signing a release.
> **(2) [No indemnity against company]**
> Despite any rule of law or equity, the person does not have any right of indemnity against the company in respect of the person's liability under this Part. This is so even if the person was acting, or purporting to act, as trustee for the company.[46]

In Australia, while the promoter may be released from liability, , he will not be entitled to an indemnity from the company, and if a third party makes a claim, the promoter may have to cover the loss and damage suffered by the third parties.[47] Further, section 133 of ACA makes it clear that Part 2B.3 of the ACA is intended to replace all rights and liabilities anyone might otherwise have or be subject to in relation to pre-incorporation contracts.

Finally, section 21 of the South Africa Companies Act, No. 71 of 2008 dealing with Pre-incorporation contracts now provides thus:

> 21. Pre-incorporation contracts
> (1) A person may enter into a written agreement in the name of, or purport to act in the name of, or on behalf of, an entity that is contemplated to be incorporated in terms of this Act, but does not yet exist at the time.
> (2) A person who does anything contemplated in subsection (1) is jointly and severally liable with any other such person for liabilities created as provided for in the pre-incorporation contract while so acting, if-
> (a) the contemplated entity is not subsequently incorporated; or
> (b) after being incorporated, the company rejects any part of such an agreement or action.
> (3) If, after its incorporation, a company enters into an agreement on the same terms as, or in substitution for, an agreement contemplated in subsection (1), the liability of a person under subsection (2) in respect of the substituted agreement is discharged.
> (4) Within three months after the date on which a company was incorporated the board of that company may completely, partially or conditionally ratify or reject any pre-incorporation contract or other action purported to have been made or done in its name or on its behalf, as contemplated in subsection (1).
> (5) If, within three months after the date on which a company was incorporated, the board has neither ratified nor rejected a particular pre-incorporation contract, or other action purported to have been made or done in the name of the company,

---

46 ACA, *Ibid* at s 132.

47 *Ibid* at s 132.

> or on its behalf, as contemplated in subsection (1), the company will be regarded to have ratified that agreement or action.
> (6) To the extent that a pre-incorporation contract or action has been ratified or regarded to have been ratified in terms of subsection (5)-
> (a) the agreement is as enforceable against the company as if the company had been a party to the agreement when it was made; and
> (b) the liability of a person under subsection (2) in respect of the ratified agreement or action is discharged.
> (7) If a company rejects an agreement or action contemplated in subsection (1), a person who bears any liability in terms of subsection (2) for that rejected agreement or action may assert a claim against the company for any benefit it has received, or is entitled to receive, in terms of the agreement or action.

With the above outline of commonwealth statutory company law on pre-incorporation contracts, what follows below is a discussion of their historical, policy and judicial interpretation. Part 6 analyses the conflict of laws controversies surrounding oral and un-executed written pre-incorporation contracts.

IV. PRE-INCORPORATION LAW RULES PROTECTING THE THIRD PARTIES.

As was historically evident in cases such as *Newborne v Sensolid Ltd*, *Black v Smallwood* and *Phonogram v. Lane*,[48] the common law courts struggled to protect the 'innocent' third parties who had 'unknowingly' entered into an unenforceable contract with an unexacting principal through looking at the 'intent of the parties,' novation, etc. These approaches were carried on into the statutory amendments of post-1970's.

---

48 *Newborne v Sensolid Ltd,* [1954] 1 QB 45; *Black v Smallwood*, 1966 117 CLR 52; *Phonogram v Lane,* [1982] QB 938,; See also H.M. Ogilivie, "Company Law-Contract-Liability of Persons Purporting to Contract as Agent for Unformed Company: Phonogram v. Lane," (1983) *University of British Columbia Law Review* 321; *Stephen vs Build Co. Nigeria Limited,* (1968) 1 All NLR 183.

A. Statutory Provisions Allowing Recovery Against Dormant/Silent Promoters

While section 86(1)&(2) of CAMA 2020 makes an attempt to expressly define a "Promoter,", this paper submits that *provisions should also be made to capture the position of "Silent and/or Dormant Promoters.* In this regard, section 86(1)&(2) of CAMA 2020 provides thus:

> (1) Any person who undertakes to take part in forming a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose, or who, with regard to a proposed or newly formed company, undertakes a part in raising capital for it, shall prima facie be deemed a promoter of the company: Provided that a person acting in a professional capacity for persons engaged in procuring the formation of the company shall not thereby be deemed to be a promoter.
>
> (2) A promoter stands in a fiduciary relationship to the company and shall observe utmost good faith towards the company in any transaction with it or on its behalf and shall compensate the company for any loss suffered by reason of his failure so to do.

Yet, in *Traynor vs Mandalay (Pty) Ltd.*,[49] the Australian High Court considered who a Promoter is. There, a company (Coy 1) purchased a piece of land on which it intended to construct a Block of flats. The land was thereafter sold at a profit to a new company (Mandalay). Mandalay advertised and attracted applications for various parcels of shares, each of which entitled the owner to the sole use of a flat. The flats were never built, and Mandalay brought an action against its promoters (directors and shareholders of Coy 1) and the Vendor of the land to recover moneys paid by Mandalay shareholders. While various shareholders of Coy 1 that initiated the purchase of the land took active part in the scheme, others took no active part, *but stood to substantially profit from the scheme while allowing other active promoters to act on their behalf*. The third class of Coy 1 shareholders were those who had fallen out with the active promoters who stood only to recover their original contribution to Coy 1 upon commencing litigation. All the shareholders of Coy 1 were held to be promoters and the latter two categories who took no active part in the promotion of the scheme were held to be "silent promoters."

It is submitted that, similar to section 269 of CAMA 2020 which expressly provided for shadow Directors who take no active part in

---

[49] (1953) 88 CLR 215.

managing a company—but who exercise control and/or influence over the active directors, section 86 of CAMA 2020 should be amended to make express provisions covering persons who either contributed funds and/or services to the activities of erring promoters, as well as those who stand to profit from promoters activities.

B. The Proposed Company to be Registered and/or Ratify the Pre-Incorporation Contract Within a Stipulated Period or Within a Reasonable Time After Registration.

There is a huge gap in section 96 of the Nigerian CAMA 2020 as there is no stipulation as to the timeframe within which the proposed company must be registered or ratify the pre-incorporation contract. The lack of exactitude creates a path to escape from legal obligation, defeats the practical effect of statutory obligation, and may foster injustice. Without an agreed time, a Court would be called on to consider all the facts and circumstances of the case should the contracting parties be in dispute about a "reasonable time." In South Africa, the 2008 amendment also made provision for the specific period within which the companies are to decide whether or not to ratify and adopt the pre-incorporation contract:

> (4) Within three months after the date on which a company was incorporated the board of that company may completely, partially or conditionally ratify or reject any pre-incorporation contract or other action purported to have been made or done in its name or on its behalf, as contemplated in subsection (1).

In Maryke Boonzaier's opinion:

> This provision is in the interests of both third parties and companies. It affords the company a fair amount of time in which to apply its attention and reach a decision with regards to the pre-incorporation contract before liability is imposed on it. In the same vein, third parties will only have to wait a maximum of three months for the company's decision in this regard.[50]

---

[50] Maryke Boonzaier, *supra* note 1 at 31.

Generally, ratification occurs when the company adopts or confirms the pre-incorporation contract. The contract is formed on the date the contract is ratified.[51] In *Aztech Science Pty Ltd v Atlanta Aerospace (Woy Woy) Pty Ltd*,[52] the promoter of Aztech Science (AZ), a company yet to be registered, entered into a contract with Atlanta Aerospace (AA). The parties agreed that the contract would terminate if AZ was not registered or did not ratify the contract within 60 days of the contract date, i.e., 17 February. Shortly before the 60 days was to expire, AA assured the promoter that AA could "take a few extra days to set everything up." AZ was registered on 20 February. AA did not provide the agreed services and AZ sued for breach of contract. The evidence revealed that in the period from December to March, AA performed services under the contract and on 26 February, AA issued an invoice for the services under the contract and AZ paid the invoice on that date. It was held that there was a binding contract between AA and AZ, as the "agreed" time under section 131(1) of Australian Corporations Act does not have to be part of the pre-incorporation contract, and so, as the parties orally agreed to extend the initial time limit, and AZ was registered within the period contemplated by the extension (i.e. 20 February was "within a few days" of 17 February), there was a valid ratification of the pre-incorporation contract. This is also the position of the law in Canada under, e.g., section 21(2) of OBCA:

> Adoption of contract by corporation
> (2) A corporation may, *within a reasonable time after it comes into existence,* by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption.... (emphasis added).

To forestall the passage of unreasonable length of time before the proposed company would be registered or before, post registration, the pre-incorporation contract would be ratified, section 96 of Nigerian CAMA 2020 should be amended to provide that a valid ratification of a pre-incorporation contract would only occur where the proposed company is registered and ratifies the contract:

(a) within the time agreed to by the parties to the contract; or
(b) if there is no agreed time—within a reasonable time after the contract is entered into.

---

51 *Keswick Developments Pty Ltd v Kevroy Pty Ltd,* [2009] QSC 176 [*Keswick*].

52 (2005) 55 ACSR 1, NSWCA 319 [*Aztech Science*].

C. Whether Writing Should be Required as Constituting a Valid Ratification?

Under contemporary law, the company may, in an express or implied way (conduct or action), adopt or confirm the pre-incorporation contract. In Canbar West,[53] the fact that the new company took over the duties and performed the construction work undertaken by the old company was held to be a valid ratification. Similarly, in *Aztech Science Pty Ltd v Atlanta Aerospace (Woy Woy) Pty Ltd*,[54] whilst AZ did not formally ratify the contract, there was sufficient conduct shortly after AZ's registration to constitute acceptance of the contract.

However, in Nigeria what is needed to ratify a pre-incorporation contract is a valid written resolution of the company, under sections 96(1) and 235(1),(2)&(3)(d) of CAMA 2020—a position entrenched by the Nigerian Supreme Court in Societe Generale Favourise Le Development du Commerce et de L'Industre en France vs Societe Generale Bank (Nig) Ltd. (Societe). In Societe, the issue was whether by the combined effect of Sections 72, 624 and 626 of the Repealed CAMA an agreement entered into before the company's incorporation which was later ratified after its incorporation became binding on the company. In 1976 three Nigerian gentlemen entered into an agreement with Societe France to establish a bank in Nigeria, the Societe Generale Bank (Nigeria) Ltd, (Societe Nigeria). In December1976, Scociete Nigeria was duly incorporated under the defunct Companies Act,1968. Societe France was to act as manager of Societe Nigeria. In July 1976, five months prior to the bank's incorporation, its founding members entered into another agreement ("the July agreement"). On 8 March 1977, this agreement was ratified by Societe Nigeria's board of directors. The July agreement contained a clause that any dispute between the parties would be referred to arbitration. The relationship between Societe France and Societe Nigeria later started deteriorating, Societe Nigeria accused Societe France in its capacity as manager of the bank, of mismanagement and negligence. As a result, Societe Nigeria terminated its contract with Societe France and in December 1989 instituted action in the High Court of Lagos State for the recovery of more than N190 million as well as the equivalent in Naira of an additional

---

53 *Canbar*, *supra* note 13.

54 *Aztech Science*, *supra* note 51.

FF20.75 million from its former manager. Thereupon Societe France, invoking the arbitration clause contained in the July agreement, applied for a stay of proceedings. The matter was heard in January 1990 and in April 1990 the High Court ordered a Stay of Proceedings. Societe Nigeria successfully appealed tothe Court of Appeal and Societe France appealed to the Supreme Court. Inter alia, the minutes of the meeting of Societe Nigeria's board of directors held at the Federal Palace Hotel, Victoria Island Lagos on 8 March 1977 where the agreement of 7 July 1976, was ratified was held to be valid. Even under CAMA 2020, a Public Limited Company is obligated, within sixty (60) days of incorporation to hold its Statutory Meeting of its shareholders towards approving sundry mutters, including "terms of pre-incorporation contracts." In this connection, Section 235(3)(d) of CAMA 2020 provides:

> (1) Every public company shall, within a period of six months from the date of its incorporation, hold a general meeting of the members of the company (in this Act referred to as "the statutory meeting").
> (2) The directors shall, at least 21 days before the day on which the statutory meeting is held, forward to every member of the company a copy of the statutory report.
> (3) The statutory report shall be certified by not less than two directors or by a director and the secretary of the company and shall state—
>
> ***
>
> (d) the particulars of any pre-incorporation contract together with the particulars of any modification or proposed modification thereon;

Clearly, a formal written resolution is no more needed in other jurisdictions.[55] Ratification may be express (signing a document or passing a Board resolution) or implied by the party's conduct (payment of the purchase price for goods supplied or to be supplied under the contract).[56] The *Aztech* decision has shown that ratification can be done orally or

---

55 *Aztech Science*, *supra* note 51.

56 *Ibid.*

through the conduct of the parties. This is also the position of the law in Canada under, e.g., Section 21(2) of OBC:

> Adoption of contract by corporation
> (2) A corporation may, within a reasonable time after it comes into existence, by any *action or conduct* signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption.... (emphasis added).

In South Africa, Section 21(5) provides for deemed/implied ratification after three months:

> (5) If, within three months after the date on which a company was incorporated, the board has neither ratified nor rejected a particular pre-incorporation contract, or other action purported to have been made or done in the name of the company, or on its behalf, as contemplated in subsection (1), the company will be regarded to have ratified that agreement or action.

Such express statutory provisions are also needed in Nigeria.

D. Registration/Lodgment of (Certified) Copies the Pre-Incorporation Document with the Government Agency.

Since Section 235 of CAMA 2020 requires particulars of pre-incorporation contracts to be approved via written resolution of the shareholders to be filed with Nigeria Corporate Affairs Commission (CAC), this paper submits that copies of pre-incorporation contracts be lodged with the CAC in Nigeria similar to former Section 35 of the 1973 Companies Act which required the lodging of the pre-incorporation contract with the Registrar of Companies in South Africa. Until 2008, in South Africa, a peculiar feature of protecting the third-party and the public is the requirement that the pre-incorporation contract be lodged or registered with the Government Agency in charge of registering companies. The public visability of the contract appears akin to the use of a Prospectus during public offering of shares by a publicly limited company—to disclose all material facts about the proposed company and pre-incorporation contract to the third parties and the entire world, Thus, Section 50 of the South Africa Companies Act No. 46 of 1952,[57] provided: "...and that a copy of such contract, has been lodged with the Registrar together with the

[57] *South Africa Companies Act* No. 46 of 1952.

application for registration of the company." Further, in 1963, Section 9 of the South Africa Companies Act No. 14 of 1963,[58] also provided:

> "...and that two copies of such contract, one of which shall be certified by a notary public or by a subscriber to the memorandum, have been lodged with the Registrar together with the application for registration of the company."

Thus, according to Maryke Boonzaier:

> In light of the experience gained since 1926 about the operation of Section 71, the legislature might have thought it essential that, before the adoption or ratification of such a contract by the company, a copy of it (and after 1963, a certified copy of it) should be made available in the Companies Registry for any interested person to inspect or obtain a copy. The registry would thus be an alternative place for inspection and place moreover where a copy of the contract could be obtained. [59]

In 1963, the South African government inaugurated the Van Wyk de Vries Commission to examine the 1926 Companies Act and to consolidate all the amendments and propose reforms. The Van Wyk de Vries Commission recommendations and report[60] were enacted as the 1973 Companies Act. The amended law in Section 35 of the 1973 Companies Act provided thus:

> Any contract made in writing by a person professing to act as agent or trustee for a company not yet incorporated shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and such contract had been made without its authority:
>
> Provided that the memorandum on its registration contains as an object of such company the ratification or adoption of or the acquisition of rights and obligations in respect of such contract, and that two copies of such contract, one of which shall be certified by a notary public, have been lodged with the Registrar together with the lodgement for registration of the memorandum and articles of the company.

Despite this amendment, Maryke Boonzaier had noted that:

> It is evident that Section 35 does not reflect significant modifications made to its predecessor (Section 71 of the 1926-Act). Trivial changes such as the words 'on its

---

58 *South Africa Companies Act* No. 14 of 1963.

59 Maryke Boonzaier, *supra* note 1 at 18.

60 Van Wyk de Vries Recommendations and Report are stated in South Africa Company Law For The 21ST Century: Guidelines For Corporations Law Reform GN 1183 GG 26493 of June 23, 2004 (The Company Law Policy Paper) 33.

> registration' were inserted in section 35 of the 1973-Act,... These words were included in the section to prevent subsequent insertion of the object into the company's memorandum after its registration. The question that arose in the *Sentrale Kunsmis* case with regards to the exact time when the object must be absorbed into the memorandum has therefore been remedied by Section 35.[61]

In a major argument against former Section 35 of the 1973 Companies Act which required the lodging of the pre-incorporation contract with the Registrar was that such action would rob the company and its business partners of confidentiality. As a result, extant Section 21 of 2008 Act has abrogated this requirement:

> The requirement to lodge copies of the pre-incorporation contract was...detrimental to companies, because it robbed companies and their contractual partners of confidentiality of their agreements, and possibly exposed them to unfair practices such as undercutting by competitors.[62]

The decision to remove the lodging of pre-incorporation requirement was necessary because the company's privacy in its pre-incorporation contracts outweighs protection to third parties.[63] In Nigeria, principles of corporate transparency and accountability should trump corporate confidentiality.

E. Remedies and Damages Available to the Third Parties in Cases of Breach of Contract.[64]

There are no specific remedies enumerated under Section 96 of CAMA 2020. Thus, the damages and legal and equitable remedies available to the third parties where either the company was not subsequently incorporated or it was incorporated but failed to ratify the pre-incorporation contract, may not be statutory. The first type of remedy is a claim for damages. In

---

61 Maryke Boonzaier, *supra* note 1 at 21.

62 *Ibid* at 29.

63 Caroline B Ncube, "Pre-Incorporation Contracts: Statutory Reform" 126: 2 South Africa LJ 260 at 260-261.

64 J.D. Cox, T.L. Hazen & F.H. O'Neal, *Corporations* (New York: Aspen Law & Business, 1997) at 73-75; J.S. Ziegel, R.J. Daniels, J.G. MacIntosh & D.L. Johnston, *Cases and Materials on Partnerships and Canadian Business Corporations,* 3d ed. (Toronto: Carswell, 1994) at 269-70; J.H. Choper, J.C. Coffee, Jr. & R.J. Gilson, *Cases and Materials on Corporations*, 4th ed. (Boston: Little, Brown & Co., 1995) at 296-97; J.A. Van Duzer, *The Law of Partnerships and Corporations*, (Toronto: Irwin Law, 1997) at 140-144.

Nigeria, the object of awarding damages is to put the injured party, so far as money can do it, in the same position as if the contract had been performed.[65] Such damages may be nominal or substantial as the case may be. To be entitled to substantial damage, the plaintiff needs to show that he has suffered 'loss,' i.e., harm or injury to his person or property. However, the plaintiff cannot recover damages for any loss which he could have avoided but which he has failed by act of omission or commission or through unreasonable action or inaction to avoid. The principles of causation of loss and the remoteness of loss (like in tort) are as enunciated in *Hadley v. Baxendale*.[66] Similarly, the third party may be entitled to rescission.[67] This is an equitable remedy available to an injured party for a breach of condition or where there is a mistake or misrepresentation. Rescission terminates the contract.[68] The third party may also seek specific performance,[69] which is also an equitable remedy. It is an order issued by the court, ordering a defendant to perform the promise he had made. The granting of the request for specific performance by the court is discretionary and is not available in the case of contract for personal service. The court will grant an order of specific performance where an order of monetary compensation will not be a remedy to the injured party.[70] Further, the third party may seek an injunction,[71] another equitable remedy, which is an order by the court ordering a person not to do certain act. It is used for restraining a person from committing a breach of contract.[72] Injunction may be prohibitive where it is to stop the doing or repetition of some act or mandatory where it compels the performance of an act. Another remedy is *quantum meruit*.[73] This is a sort of part-performance in which a party claims "as much as he deserves." *Quantum meruit* is a claim where work done is in

---

65 *Univeral Vulcanising (Nig.) Ltd. v. Ijesha United Trading and Transport Co. Ltd. and 6 Others* (1992) 9 NWLR (pt 266).

66 (1854) 9 Exch. 341).

67 *Dantata v. Mohammed* (2000) 7 NWLR (Pt. 687) 396.

68 *London Assurance v. Mansel* (1879) 11 Ch. D 363.

69 *Balogun v. Alli-Owe* (2000) 3 NWLR (Pt. 649) 477 C.A.

70 *Fakoya v. St. Paul's Church*, (1966) 1 All NLR 68.

71 *Gbadamosi v. A-G Lagos State*, (2001) 6 NWLR (Pt 709) 437 C.A.

72 *Akenzua II v. Benin Divisional Councils*, (1959) WRNLR 1.

73 *Cutter v. Powell*, (1795) 6 Ter,/ Re[826; *Warner & Warner v. Federal Housing Authority*, (1993) 6 NWLR (Pt. 298) 148 S.C

partial performance especially where the contract is severable or divisible or can be separated.[74] A third party may also seek repudiation. An injured party to a contract may be allowed to regard himself as not being bound by the contract in consequence of its breach. In other words, the law in that circumstance permits him to beleive the contract no longer binds him since the other party has breached the contract. But the other party also has the option of accepting or refusing the repudiation.[75] Finally, the Nigerian third party may also seek restitution, involving the return to the injured party his goods or property or its monetary equivalent in order to restore him to his former position.[76]

Unlike Nigeria, Australia and Canada[77] have express statutory remedies available to the third party. Thus, the third party's claim may be limited by statute. In *Bay v Illawarra Stationary Supplies Pty.*,[78] four advocates were acting for a proposed company, but only one of them, an accountant, acted on behalf of a proposed company: and had entered into a contract on behalf of the company. The company was not formed at that time, and after the company was formed failed to ratify the contract, with Illawarra being frozen out, Illawarra suppliers tred to sue all four advocates. The New South Wales Supreme Court, using the predecessor to Section 131(2) of Australia Corporations Act found only one of the account was liable to pay the damages because he was the only who had signed the contract.

In Ontario, Canada, Section 21(3) of the OBCA provides:

> **Non-adoption of contract**
> (3) Except as provided in subsection (4), whether or not an oral or written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit. R.S.O. 1990, c. B.16, s. 21 (3).

---

74 *Ekpe v. Mid-Western Nigerian Development Corporation.*

75 *Okongwu v. NNPC*, (1989) 4 NWLR (Pt 115) 296.

76 *Hyun Sung Hydraulic Machinery Co. Ltd v. Hassan Jaffer*, (2004) 15 NWLR (Pt 896) 343 at 361.

77 Puri, *supra* note 7 at 1051-1064

78 (1986) 4 ACLC 429.

From the above, Section 21(3) of OBCA allows the third party to commence suit against both the corporation and the promoters, even if there is no contract under *Black v Smallwood* and in *Westcom Radio Group Ltd, v Maclsaac*,[79] both of which look at the intention of the promoters and the third party while signing the pre-incorporation contract. Both decisions state that where both parties were intending that only the party would be the party to the contract, since there was no company in existence the contract was a nullity *ab initio*. Now, Section 21(3) expressly provides that the third party may apply to a court for an order fixing obligations under the contract as joint, or joint and several, or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit. The two-step approach in in *Westcom Radio Group Ltd, v. Maclsaac*, appears unnecessary. In *Szecket v. Huang*[80] where the parties did not get to execute the licensing agreement either in Ontario or in Taiwan, the Ontario Court of Appeal upheld the applicability of Section 21(1)&(3) pf OBCA and ordered damages for plaintiffs. In *Canbar West*, the Alberta Court of Appeal, acting under Section 15(3) of ABCA, issued an order for imposition of a mechanic's lien founded upon a pre-incorporation contract. The nature of remedies may be fashioned depending on the circumstances.

In Australia, similar statutory provisions are available under Section 131(2),(3)&(4) of ACA. First, under sub-section (2) the promoter is to pay damages where the company is not registered, or the company is registered but does not ratify the contract or enter into a substitute for it, within the time agreed to by the parties to the contract; or if there is no agreed time—within a reasonable time after the contract is entered into. There is however a caveat that the amount the person is liable to pay to a party is the amount the company would be liable to pay to the party if the company had ratified the contract and then did not perform it at all. This was the position in *Bay v Illawarra Stationary Supplies Pty.*,[81] where the plaintiff was only allowed to recover against the sole promoter who signed the aborted contract but not against all the promoters. In addition, Section 131(3) of ACA provides for recovery against the new company where the company is registered but does not ratify the pre-registration contract or enter into a substitute for it. The

---

79 *Westco, supra* note 15.

80 *Szecket, supra* note 16.

81 (1986) 4 ACLC 429.

court may do anything that it considers appropriate in the circumstances, including ordering the company to do one or more of the following: pay all or part of the damages that the person is liable to pay; transfer property that the company received because of the contract to a party to the contract; or pay an amount to a party to the contract. This is similar to Section 21(3) of OBCA. Finally, if the company ratifies the pre-registration contract but fails to perform all or part of it, the court may order the person to pay all or part of the damages that the company is ordered to pay.[82] In South Africa, Section 21(7) of the 2008 Act provides that if the company, after taking the benefit of the pre-incorporation contract, can be sued for the accrued benefit should it decide not to ratify the contract:

> (7) If a company rejects an agreement or action contemplated in subsection (1), a person who bears any liability in terms of subsection (2) for that rejected agreement or action may assert a claim against the company for any benefit it has received, or is entitled to receive, in terms of the agreement or action.

In Nigeria, the only instance where there was a move towards an expansive judicial intervention was in *Edokpolo vs Sem-Edo Wire Industries Ltd.*[83] On 27th October 1975, Edokpolo executed a pre-incorporation agreement with SEM Nigerian Holding GHBH and Company Hamburg, (a German company) to create Sem-Edo Wire.The contract stipulated that Edokpolo would own 40% and the German Company would own 60% in the new Sem-Edo Wire company. The agreement was incorporated into the memorandum of the new company. The company was incorporated on 5th December 1975. On 27th February 1976, the new company allotted part of Edokpolo's 40% to the chairman and the solicitor, despite a post-incorporation adoption of the share allotment agreement by Sem-Edo Wire's Board of Directors in accordance with the pre-incorporation contractJustice Nnamani, JSC, held that there was nothing to prevent the new corporation from ratifying the pre-incorporation after its later registration:[84]

> But there is nothing preventing the company after incorporation from entering into a new contract to put into effect the terms of the pre-incorporation contract. This new contract can be in express terms or can be implied from the acts of the

---

82 ACA, *supra* note 3 at s 131(4).

83 (1984) N.S.C.C. 553.

84 *Ibid* per Nnamani, JSC at 561, while relying on *Touche vs Metropolitan Railway Warehousing Co.*, (1871) 6 Ch.App. 671.

> company after incorporation as well as from the minutes of its general meetings and board meetings.[85]

After examining the pleadings, Justice Nnamani further held that:

> The implication of this is clearly that after incorporation the company...in its meetings entered into arrangements similar to those contained in the 1975 agreement.[86]

Arguably, in Nigeria, based on *Edokpolo*, the company, by its own post-incorporation resolution may unilaterally ratify a pre-incorporation contract. This paper submits that Nigeria must update its Section 96 of CAMA by expressly adopting similar statutory provisions as contained under Section 14 of OBCA and Section 131 of ACA, respectively. The court should be statutorily empowered to fashion appropriate orders that would do justice in the circumstances of each case.

V. STATUTORY PRE-INCORPORATION LAW RULES PROTECTING THE COMPANY.

In addition to the fiduciary duties imposed on the promoters,[87] there are extensive statutory rules to protect the proposed companies with flexibility of choice with the name and manner of incorporation and procedure and means of ratifying/adopting the pre-incorporation contract.

A. Companies Which Are Reasonably Identifiable With The Pre-Incorporation Contract.

One of the problems associated with pre-incorporation contracts occurs when the proposed name for the yet-to-be registered company, as used in the contract, turns out to be unavailable. In Nigeria, the company that is expected to adopt and/ratify the pre-incorporation contract appears to be the same company as would have been mentioned in the contract.

---

85 *Ibid* per Nnamani, JSC at 561.

86 *Ibid* per Nnamani, JSC at 562; See also, *Edwards vs Halliwell*, (1950) 2 All ER 1064; *Heyting vs Dupont*, (1964) 1 WLR 843; *Burland vs Earle*, [1902] AC 83 (PC).

87 CAMA 2020, *supra* note 7 at ss 86(3)&(4).

This appears restrictive when compared with Section 131 of the ACA which provides thus:

> **[Pre-registration contract binding]**
> (1) If a person enters into, or purports to enter into, a contract on behalf of, or for the benefit of, a company before it is registered, the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract: within the time agreed to by the parties to the contract; or if there is no agreed time—within a reasonable time after the contract is entered into. (emphasis added).

The legal effect of a "Company [that] is reasonably identifiable with" the pre-incorporation contract should raise a concern for Nigerian law makers. In *Malilu Nigeria Limited v. Mai Ulu Nigeria Limited,*[88] where land was allocated to a company, having applied for their name on the 25th October, 2010. However, its name was wrongly spelt by the issuing authority on the Letter of Allocation granted to it as "Maililu Nig. Ltd" instead of "Mai ulu Nig. Ltd. Although the legality of the pre-incorporation contract was saved by an application for rectification, the more appropriate way would be to have a clause similar to Secretion 131(1) of the ACA in the Nigerian law. Also, in *Canbar West Projects Ltd v. Sure Shot Sandblasting & Painting Ltd.,*[89] Can-West Projects Ltd entered into a contract with Sure Shot to construct facilities on land owned by a company related to Sure Shot. However, Can-West was not yet incorporated. When promoters of Can-West attempted to incorporate it, the name was taken. Thus the promoters chose a new name—Canbar West Projects Ltd. In turn, Canbar registered a trade name "Can-West Projects" which Canbar started using. Upon incorporation, Canbar performed the rest of the work as Canbar West Projects Ltd., upon non-payment by Sure Shot, Canbar registered a mechanic's lien against the property. Though the trial judge held that Canbar did not have a valid lien because it had not entered into the contract, and that Canbar had not adopted the contract made in the name of Can-West, the question is whether Canbar Wesr was reasonably identifiable with the conract? The Court of Appeal of Alberta reversed both of the trial judge's findings. First, the Court of Appeal held that, so far as the lien was concerned, it did not matter that the contract was not in the name of Canbar. The entitlement to a lien arises from three elements: (a)

---

88 (2019) LPELR-47688(CA) 33-35 at paras D-C.

89 *Canbar*, *supra* note 13.

the owner requests the work; (b) the claimant does the work, and (c) and the work improves the value of the land. The lien does not arise from the existence of a contract. Indeed a contract with the owner will not exist between the owner and a sub-contractor and yet sub-contractors can file liens. Here, Canbar had done the work, at least from the date of its incorporation; and the land had been improved. The mere fact that the contract had been made with a contractor under another name did not mean that the owner had not requested the work to be done. In effect, the trial judge had incorrectly used principles relating to the making of contracts when the issue related to construction liens. Some of the work had been done before Canbar's incorporation. As to that work, the Court of Appeal referred to Section 15(3) of the Alberta Business Corporations Act (ABCA),[90] which deals with pre-incorporation contracts, and held that Canbar had adopted the contract made in the name of Can-West, in two ways:

A) First, the name on the contract was very similar to the name of the company as incorporated. In this circumstance, the contract can be said to have been made "in its name" within Section 15(3) of ABCA.[91] As the court said, "minor variations in name surely must be included with respect to contracts made in the name of a then non-existing corporation."[92]

B) Second, the contract was made "on behalf of" the company within the meaning of the subsection. The principals intended to incorporate a company, to use the Can-West name and to have it perform the work, and they only adopted another name because that name was taken. The company in fact adopted and performed the contract and the owner took no objection to the company doing further work after they knew that the lien was filed in the name of CanBar.[93]

Further, in *Commonwealth Bank of Australia.*,[94] the promoter of Towrang Pty. Ltd attempted to change the company name to Australian Solar information Pty. Ltd., while the trade-in company was in existence before the pre-incorporation contract was executed. The new name was held to be

---

90 ABCA, *supra* note 7.

91 Heintzman, *supra* note 12.

92 *Canba*r, *supra* note 13.

93 Heintzman, *supra* note 12.

94 (1987) 5 ACLC 124.

reasonably identifiable with the contract, as specified by Section 131(1) of ACA. Thus, an unregistered company must be reasonably identifiable if the contract is to be binding:

> The most obvious solution to this problem would be to register the company under the same name that was used to enter into the contract... The company would be reasonably identifiable with the one that entered into the contract. Using the same name may not always be a possible or desirable solution. A company may still be deemed to be reasonably identifiable even if it is named differently. This is possible where the facts surrounding the contract clearly show that the registered company is the company which was intended to be contracted with.[95]

Another situation in which the provision may be used is where a well-prepared pre-incorporation contract makes it clear as to who the parties to the contract are, but the company is unable to register the exact name. Where a company which has the same name but is substantially different from the company that is a party to the contract, such cannot be held as reasonably identifiable.[96]

In a country such as Nigeria, with over two hundred and fifty (250) different ethnic groups—making the likelihood of misspelling and erroneous capturing of registrable names highly likely, as a result, a clause containing the words: "Company is reasonably identifiable with" the pre-incorporation contract should be expressly provided in Nigeria company law.

VI. STATUTORY PRE-INCORPORATION LAW RULES PROTECTING THE PROMOTERS.

Notwithstanding extensive provisions protecting both the third parties and the company due to the activities of the promoters, Nigeria should follow suit by enacting several statutory provisions for the protection of corporate mid-wives who labour and toil to create the corporate entities which, in turn, contribute to Nigerian economy.

---

95 Wojtowicz, ***supra*** **note 10.**

96 *Ibid*.

A. Promoter May Seek an Interim Order Apportioning or Fixing Liabilities Pending Registration or Ratification

In Ontario, Canada, Section 21(2.1) of the OBCA provides that until a corporation adopts an oral or written contract made before it came into existence, the person who entered into the contract in the name of or on behalf of the corporation may assign, amend or terminate the contract subject to the terms of the contract. Similar to the assignment of a Bill of Laden in international maritime law, it makes good business sense to allow the promoter to transfer his inchoate rights under the pre-incorporation contract to a *bona fide* purchaser, for value.

B. Disclaimer by the Promoter

Under Section 21(4) of OBCA, if expressly so provided in the oral or written contract referred to in Section 21(1), a person who purported to act in the name of (or on behalf of the corporation) before it came into existence is not in any event bound by the contract or entitled to the benefits thereof. As was held in *Szecket v. Huang*[97] for Section 21(4) to apply, there must be an express waiver of liability. Section 21(4) is:

> "clear and unambiguous. To limit the liability of a person who enters into a pre-incorporation contract, an express provision to that effect must be contained in the pre-incorporation contract."[98]

In *Szecket v. Huang*, the parties initially drafted a licensing agreement under which Mr. Huang was under both a personal liability and personal guarantee on behalf of the proposed company. However, the final agreement signed by the parties removed both clauses of personal liability and personal guarantee, Huang then contended that that was enough to constitute write express waiver of personal liability under Section 21(4) of OBCA. The Ontario Court of Appeal rejected this argument:

> The Court refused to consider the draft agreements and the removal of the personal guarantees by Huang; it stated that Huang ought to have expressly provided for an exemption from liability in the agreement. The Court stated: Whatever may have been the result of the negotiations between the parties preceding the execution of the contract about the personal responsibility of Mr.

---

97 (1998), 42 OR (3d) 400, 168 DLR (4th) 402 (CA) [*Szecket*].

98 *Ibid* at 410.

> Huang for the obligations of the company to be incorporated, the contract itself contained no express provision relieving Mr. Huang from personal liability under Section 21(1) if the company was not incorporated, or if it was incorporated, and failed to adopt the contract. Had he wished to avail himself of Section 21(4), Mr. Huang could have sought the consent of the respondents to include an appropriate provision in the agreement.[99]

Similarly, in *Benedetto v. 2453912 Ontario Inc.*,[100] the issue was whether a promoter who paid a personal deposit in purchase-sale land transactions, on behalf of a proposed company—while including an express waiver of personal liability under Section 21(4) of OBCA was entitled to reclaim the deposit. The court held that the company law statute would not avail the promoter as the deposit was both an inducement to perform and a penalty for failure to perform.

C. Releasing the Promoter From Liability

Finally, under Section 132 of the ACA, a promoter can seek a release from liability from both the company and the third party:

> **132 Person may be released from liability but is not entitled to indemnity**
> (1) [A party to contract may release company from liability]
> A party to the pre—registration contract may release the person from all or part of their liability under section 131 to the party by signing a release.
> (2) [No indemnity against company]
> Despite any rule of law or equity, the person does not have any right of indemnity against the company in respect of the person's liability under this Part. This is so even if the person was acting, or purporting to act, as trustee for the company.[101]

Similar statutory provisions are necessary in Nigeria where the ease of doing business is very minimal with attendant high risk and danger to investment.

---

99 *Ibid.*

100 *Benedetto v. 2453912 Ontario Inc.*, *supra* note 14.

101 ACA, *supra* note 3 at Section 132.

VII. JURISDICTION ISSUES

How should Nigerian courts decide the applicable procedural and substantive rules to legal disputes involving pre-incorporation contracts where the company was never registered, the contract is an oral one and one of the parties is resident outside Nigeria? Another scenario where this might be an issue is where a Nigerian company did not ratify the pre-incorporation contract after registration with some foreign partners and parts of the project to be undertaken to be executed offshore. In the case of the oral contract, the foreign party may institute an action, e.g., in London, with the English court applying the choice of law rules of the United Kingdom, even though the parties may have intended to register the company in Nigeria—with the unwanted result that rigid common law rules from *Kelner vs Baxter* might apply. Whereas an action in Nigeria may invoke Section 96 of CAMA 2020. The same quagmire may occur in the second scenario since the company did not ratify the pre-incorporation contract at any time. Therefore, there will be no written contract to show where the exact location of executing the contract is so as to tie it to a particular jurisdiction. Scholars have suggested, at least, two approaches to deal with the issue of jurisdiction.[102] According to M.A. Maloney[103] the applicable rules where there is conflict of laws issue would be to apply the laws of the jurisdiction in which the promoter intended to incorporate.[104] Another perspective was stated by Ziegel,[105] that the law of the jurisdiction with the most connecting factors to the transaction and transacting parties ought to be applied.[106]

This issue that arose in *Szecket v. Huang* was the issue of jurisdiction when the contract was never signed or was defective. The question is which jurisdiction should have the authority to decide the case and which procedural or substantive law would govern the case. In *Szecket v. Huang* the patents were licensed in Canada while the sale and marketing were to take place in Taiwan. In fact, the plaintiffs—Szecket and Geddo spent substantial time in Taiwan and had several meetings in Taiwan.[107] Even in Canada, the

---

102 Puri, *supra* note 7 at 1063.

103 M.A. Maloney, *supra* note 2 at 433.

104 *Ibid* at 433.

105 J.S. Ziegel, *supra* note 2 at 346-347.

106 *Ibid* at 346-347.

107 Puri, *supra* note 7 at 1062-1063.

conflict of laws issue is important because the application of the law of pre-incorporation provisions from different jurisdictions may lead to dramatically different results.[108] Canada's federal statute applies, only to written contracts,[109] certain provincial statutes apply to both oral and written contracts,[110] and other provincial statutes have no pre-incorporation provisions, so the common law rules would apply.[111] However, according to Poonam Puri:

> Using the approach suggested by Professor Ziegel, it is difficult to explain why the O.B.CA. was applied [in *Szecket v. Huang*], since more of the connecting factors seemed to be with Taiwan. While the technology appears to have been developed in Ontario and the parties appear to be residents of Ontario, the production activities were to be in Taiwan and the parties to be residing in Taiwan. As a policy matter, one problem with the intentions test is that it may be an inefficient use of judicial resources to ascertain the promoter's subjective intention as to the jurisdiction of incorporation (assuming that the promoter had put his or her mind to it, at all).[112]

It has been noted that another conceptual problem with Ziegel's proposal is that a corporation can be incorporated in a jurisdiction with which it has no connecting factor[113] as in Delaware—the choice state in the United States for registering multi-national companies.[114]

In the present economiy, Nigeria is actively seeking Foreign Direct Investment (FDI) from foreign investors, it is very apposite for there to be express statutory rules to govern likely disputes from international transactions involving pre-incorporation contracts in line with Ziegel's prescription so that where Nigeria appears to be the destination of the company's activities, Nigerian law should govern.

---

108 *Ibid* at 1063.

109 CBCA, *supra* note 7 at s 14(1).

110 OBCA, *supra* note 7 at s 21(1); ABCA, *supra* note 7 at s 15(1).

111 Puri, *supra* note 7 at 1063.

112 Puri, *supra* note 7 at 1063.

113 *Ibid* at 1063.

114 Roberta Romano, *The Genius of American Corporate Law* (Washington D.C.: AEI Press, 1993); Ronald J Daniels, "Should Provinces Compete: The Case for a Competitive Corporate Law Market" (1991), 36 McGill LJ 130; Jeffrey Macintosh & Douglas Cumming, "The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law: A Second Look" (1996) Law-andEconomics-Working-Paper-Series-WPS-49.

VIII. CONCLUSION

The above comments reveal the gaps between Nigerian company law on pre-incorporation when compared with contemporary commonwealth jurisdictions. More importantly the various suggestion for the improvement of Nigerian law should be the focus of Nigerian lawmakers within a couple of years. It is this writer's view that a company that is reasonably identifiable with a pre-incorporation contract should be able to adopt it, the contract should be adopted within a reasonable time, a pre-incorporation contract should be ratifiable via conduct, action or orally. Also, a certified true copy of the pre-incorporation contract should be registrable with the Nigerian CAC. In cases involving conflict of law issues, the law of the jurisdiction with the most connecting factors to the transaction and transacting parties ought to be applied. Protection should be provided for the promoters, as well.