

ULTRA VIRES DOCTRINE IN NIGERIAN COMPANY LAW VIS-A-VIS POSITIONS IN GHANA AND THE UNITED KINGDOM***Abstract**

The doctrine of *ultra vires* is one of the English common law principles received in Nigeria as part of its company law. The doctrine was developed by the nineteenth century courts on grounds of both shareholder and creditor protection. Unfortunately, this doctrine became 'a double edged sword' that worked against the company and third parties dealing with it. This work examines the efficacy of the doctrine of *ultra vires* in modern corporate law practice in Nigeria vis-a-vis Ghana and United Kingdom. The key issue is whether the doctrine serves any useful purpose especially in the light of modern day economic realities. The paper adopts a doctrinaire methodology and relies on information in textbooks, journal articles, internet and other reliable sources. The paper finds that in the light of modern day economic realities, the doctrine has outlived its usefulness or relevance. It is suggested that the doctrine should be completely abolished in Nigeria to give all companies unrestricted capacity.

Keywords: Company Law, Ultra Vires, Unrestricted Capacity, Nigeria, United Kingdom, Ghana.

1. Introduction

Two documents make up the constitution of a company. These are the Memorandum of association and Articles of association.¹ The Memorandum of association of the company is the fundamental constitution or charter. It defines and regulates the company's status and powers and enables shareholders and outsiders who deal with the company to know what business it is permitted to undertake and the limit of such business, capital the company has and what is its relation with outsiders generally.² In *Continental Chemists Ltd v. Dr Ifeakandu*³, the Supreme Court declared that on incorporation, the Memorandum of association becomes the company's charter of activities and defines its field of operation. It delimits the powers and operations of the company.⁴ On the other hand, the Articles of association are for the internal regulations of the company and are only concerned with the internal management or administration of the company.⁵ The Memorandum of association differs from the Articles of association in that while the Memorandum regulates the external affairs of the company, the Articles regulate the internal affairs of the company.⁶ The law requires every company to state in its Memorandum of association the nature of the business which the company is authorized to carry on, or if the company is not formed for the purpose of carrying on business, the nature of the object or objects for which it is established. At common law, a company incorporated under the Companies Act has the power only to carry out the object/business stated in the Memorandum of association; if an act is done or a transaction is carried out which is not authorized by the Memorandum, it is *ultra vires* (in other words, beyond the powers of) the company and void and cannot be ratified by the company.⁷ The doctrine of *ultra vires* therefore simply means the principle of law which prescribes that a company cannot act or do anything outside the powers conferred on it by its Memorandum of association. When an act is *ultra vires*, it cannot be ratified by the company and it is unenforceable by the company and the third parties dealing with the company.

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¹ N. Alili, 'Ultra Vires Doctrine under the Nigerian Company Law' (2009) 2(1) *Confluence Journal of Private and Property Law*, 181.

² J. O. Orojo, *Company Law and Practice in Nigeria* (5th Ed, Lagos: Lexis Nexis, 2008) p. 55.

³ [1966] 1 ALL NLR. 1.

⁴ E. Oshio, *Modern Company Law* (Benin City: Lulupath Publications, 1995) p. 43.

⁵ *Yalaju Amaye v. Associated Registered Engineering Co. Ltd & Ors* [1990] 4 NWLR (pt 145) 422.

⁶ J. O. Orojo (n. 2) p. 55.

⁷ J. O. Orojo (n. 2) p. 98.

This paper is structured into eight parts including this introduction. The second explores the origin of the *ultra vires* doctrine. The third section examines the rationale for the doctrine. The fourth discusses the evasive devices introduced by promoters to circumvent the doctrine. The fifth examines the *ultra vires* doctrine in modern Nigeria corporate law and practice. The sixth part compares the current position of *ultra vires* doctrine in Nigeria with position in Ghana and the United Kingdom. The seventh contains the conclusion and recommendations.

2. Background of *Ultra Vires* Doctrine

The doctrine of *ultra vires* is one of the English common law principles received in Nigeria as part of its company law.⁸ The doctrine was originally applicable to statutory corporations before its extension to registered companies.⁹ It was in the leading case of *Ashbury Railway Carriage & Iron Co. v. Riche*¹⁰ that the doctrine was finally extended to registered companies.¹¹ In that case, a company was incorporated under the Companies Act 1862 with the following objects:

...To make and sell, or lend on hire railway carriages and wagons and all kinds of railway plant, fittings, machinery and rolling stock ; To carry on the business of mechanical engineers and general contractors ; To purchase and sell as merchants timbers, coal, metals, or other materials, and to buy and sell any such materials on commission, or as agent; To acquire, purchase, hire, construct or erect works or building for the purpose of the company; and To do all such things as are necessary, contingent, incidental or conducive to all or any of such objects.

The company then entered into a contract for the financing of the construction of a railway line in Belgium. The contract had been ratified by all the members, but later the company repudiated the contract. The issue that was called for determination was whether the company was bound by the contract. The House of Lords (England) held that the contract to finance the construction of a railway in Belgium was not within the purview of any of the objects of the company (in other words, the contract is *ultra vires* the company), notwithstanding that there was a clause in the Memorandum of association, empowering the company 'to do all such other things as are necessary, contingent, incidental or conducive to all or any such objects.' The Court stated that the contract was void *ab initio* and not even the unanimous consent of all the members of the company in general meeting could validate or ratify an *ultra vires* contract. The Court clearly distinguished between acts performed by the board of directors of a company beyond the powers delegated to it by the Articles¹² and acts *ultra vires* the company itself because they are beyond its powers in the Memorandum of association. While the former maybe ratified by the members in general meeting, the later cannot be ratified, being void.¹³ The doctrine has been applied in other English cases¹⁴. In *Re Introduction Ltd*¹⁵ the plaintiff company by its Memorandum of association has as its principal objects the provision of entertainments services and facilities for foreign visitors, however, the company engaged in pig - breeding business for which it borrowed money from a bank leaving the later with its debentures. The business was a disaster, in an action by the bank to recover its money, it was held that the pig -breeding business was *ultra vires* the company and the debentures issued for that purpose were void as being tainted with *ultra vires*.¹⁶

⁸ E. Oshio (n. 4) p. 58.

⁹ Kigbo-Oyolo Maro, *Principles and Practice of Nigerian Corporate Law and Management* (Ekpoma: Comfort Hills Law Publications, 2009) p. 176.

¹⁰ [1875] L.R. 7 HL.

¹¹ E. Oshio (n. 4) p. 58.

¹² Professor Davies warned against using *ultra vires* to describe act/acts performed by an agent beyond its authority because the consequences of an agent acting beyond authority are quite different from those the law attached to an action outside the legal capacity of the company. While the former can be ratified by the members in the general meeting, the latter is void and cannot be ratified. *Ultra vires* should be restricted to only acts/acts performed by the company outside its Memorandum of association. See, Paul. L. Davies, *Gower and Davies, Principles of Modern Company Law* (8th Ed, London: Sweet and Maxwell, 2008) p. 153.

¹³ E. Oshio (n. 4) p. 58.

¹⁴ *Hulton v. West Corke Railway Co.* [1883] 23 Ch.D. 643; *Re Jon Beauforte (London) Ltd* [1953] Ch. 131.

¹⁵ [1970] Ch. 199; [1969] 1 All. E.R. 887.

¹⁶ E. Oshio (n. 4) p. 60.

The Nigerian courts in a number of cases have also applied the doctrine. In *Continental Chemist v. Dr Ifeakandu*¹⁷ the Memorandum of association of the company stated the following as its objects:

To import and export drugs; To buy and sell drugs ; To manufacture drugs; To compound drugs; To enter into any business which the directors think will increase the profit of the company as may be incidental and conducive to the attainment of the above objects and powers of any of them.

The company subsequently went into agreement to train the defendant to become a medical doctor with the condition that he will serve and practice under them for a specific salary. In an action for breach of contract, The Supreme Court declared that a contract outside the objects of an incorporated company is *ultra vires*, invalid and unenforceable and therefore held the contract to be invalid and unenforceable. Also in *Metalimpex v. Leventis and Co. Nigeria Ltd.*¹⁸ The Court held that where the contract is *ultra vires* the company, neither the company nor the other party to it can enforce it.¹⁹ Similarly in *Okoya and Ors v. Santilli and Ors*²⁰ the Court stated that a company conducting its affairs otherwise than on the basis of its true Memorandum and Articles of association acts *ultra vires*.²¹

3. The Rationale behind the *Ultra Vires* Doctrine

The doctrine of *ultra vires* was developed by the nineteenth century courts on grounds of both shareholder and creditor protection. In other words, that shareholders and creditors should not find that the company in which they had invested or to which they had advanced credit was engaged in a different business than they had expected at the time of the investment or loan. Ogbuanya²² succinctly stated the rationale for the *ultra vires* doctrine as follows:

The rationale is to protect two groups of persons dealing with the company, the investors and creditors, as both the investors and creditors put money in the company on the basis of the object clause of the company, and thus, the company needs to be restricted to its objects in its operations. The restriction would ensure certainty of the nature of business the money is invested in or borrowed for as it would be unfair for a person to invest or lend money for a particular object only for the money to be channeled to other objects un-contemplated. Thus, it helps to minimize risk of investment.

Davies²³ is of the view that both policy and legal technique of *ultra vires* doctrine were misplaced. He justified his view by stating that ‘the value of the company might in fact be enhanced to the benefit of both shareholders and creditors by moving into new fields of operation, so that a prohibition on such a step was too strong a rule.’²⁴

4. Evasive Devices Introduced by Promoters of Companies to Circumvent the *Ultra Vires* Doctrine

It was unfortunate, that this doctrine became ‘a double edged sword’ in that where a company enters into a contract with a third party which is outside its object and performs its own part of the contract, if the third party fails to fulfill its own part, in an action to enforce the contract, the third party will plead *ultra vires* and the company cannot enforce the contract against the third party. Similarly where a company enters into a transaction with a third party and the transaction is outside the object of the company. If the third party performs its part and the company fails to perform its part. In an action to enforce the contract against the company, the company will simply plead *ultra vires*. It would have been an exception to the doctrine of *ultra vires* in favor of a third party that deals with a company if the third party was able to prove that he was not aware that the transaction was *ultra vires* the company, however, the doctrine of constructive notice made nonsense of this exception. The doctrine of constructive notice made it impracticable for the third party to

¹⁷ *Supra*, (n. 3).

¹⁸ [1976] 1 All NLR (pt 1) 94.

¹⁹ E. Oshio (n. 4) 59.

²⁰ [1990] 2 NWLR (pt 131) 172.

²¹ E. Oshio (n. 4) p. 59.

²² N.C.S. Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Lagos: Novena Publishers Ltd, 2010) p. 201.

²³ Paul. L. Davies, *Gower and Davies, Principles of Modern Company Law* (8th Ed, London: Sweet and Maxwell, 2008) p. 153.

²⁴ This writer agrees with the view expressed by Prof. Davies. In fact it is this view that influenced this writer’s recommendations in this work.

escape the wrath of *ultra vires* doctrine. The doctrine of constructive notice is to the effect that as between the company and third party, the Memorandum and Articles of association and other documents of incorporation are regarded as public document. A person dealing with a company was expected to read the public document in order to discover if the company had the capacity to do the act in question, otherwise, he was deemed to have constructive notice of the capacity of the company.²⁵ This rigid adherence to the *ultra vires* rule and that of constructive notice resulted into adverse consequences both for the company and third parties dealing with the company, hence the English House of Lords in *Attorney-General v. Great Eastern Railway Co*²⁶ recommended a liberal construction of objects clause with the declaration that the *ultra vires* rule ought to be reasonably understood and applied so that whatever fairly be regarded as incidental to or consequential upon the specified objects of a company would be treated as *intra vires*. But the problem then was how to determine what is incidental to the objects clause of the Memorandum.²⁷ Company promoters did not appear to be satisfied with the liberal interpretation approach recommended in *Attorney-General v. Great Eastern Railway Co*,²⁸ they therefore resorted to creating various evasive devices.²⁹ The various evasive devices are discussed below:

(i) Proliferation of objects – The first of these devices was the proliferation of objects clause, that is, specifying not only objects which will normally be implied, but also even objects to cover spectrum for wider than what they will ever accomplish. The result was that instead of the succinct objects clause the specimen of which was in the Companies Act, there were found objects running to more than twenty paragraphs. The courts reacted to this practice by adopting the main object clause rule of construction to curb this mode of evasion.³⁰ The courts have held that when the main objects clause are followed by wide powers expressed in general words, the powers are expressed only for the purpose of the main objects.³¹

(ii) Insertion of what is called the independence clause formula, otherwise known as the ‘Cotman clause’³² - To avoid the effect of the main object rule of construction; company promoters resorted to the practice of inserting this clause. By this device, numerous objects are listed for a company, with a final clause to the effect that none of the objects shall be construed restrictively by being read as ancillary or subsidiary to any other object, but each object shall exist independently of the others. Such declaration would run thus:

it is hereby declared that the objects specified in each of the paragraphs of this clause shall be regarded as independent objects and accordingly shall in no wise be restricted or limited (except where otherwise expressed in such paragraph) by reference from the terms of any other paragraph but may be carried out in as full and ample a manner and construed as wide a sense as if each of the said paragraphs defined the objects of a separate and distinct company.³³

The Court in *cotman v. Brougham*³⁴ held this device to be effective.

(iii) The subjective objects clause – A further device to evade the *ultra vires* rule was the practice of including in the objects clause a provision for the carrying on of any business which the company or its directors think fit.³⁵ An example of such clause is: ‘To do all such other things as the company may think conducive to the attainment of the above objects or any of them,’ or ‘To enter into any business which the directors think will increase the profits of the company.’ This clause was accepted in some cases, the most notable of which is the *Bell House Ltd v. City Wall Properties Ltd*.³⁶ In that case, two companies carried on business as property developers. The plaintiff company had agreed to introduce the defendants to a financier

²⁵ N. Alili, (n. 1) p. 184.

²⁶ [1880] 5 App. Cass. 473.

²⁷ E. Oshio (n. 4) p. 60.

²⁸ *Supra* (n. 26).

²⁹ E. Oshio (n. 4) p. 62.

³⁰ *Ibid.*

³¹ *See Re Haven Gold Mining Company* [1882] 20 Ch.D. 169.

³² *See Cotman v. Brougham* [1918] AC 514.

³³ KIgho-Oyolo Maro (n. 9) p. 177 - 178.

³⁴ *Supra* (n. 32).

³⁵ E. Oshio (n. 4) p. at 64.

³⁶ [1966] 1 Q.B. 207.

who could provide a bridging loan of one million pounds, in return for which the defendants promised to pay a fee of twenty thousand pounds, however, in order to avoid their obligation, the defendants pleaded that the transaction was a mortgage-brokerage which was *ultra vires* the plaintiff. The plaintiff argued successfully that the transaction was *intra vires* by virtue of the omnibus sub-clause (c) of clause 3 of its Memorandum of association which authorized it to: ‘To carry on any other trade or business whatsoever which can in the opinion of the board of directors, be advantageously carried on by the company in connection with or as ancillary to any of the business or the general business of the company’.³⁷

It was held that the clause was valid and empowered the company to undertake any business which the directors *bona fide* believed could be advantageously carried on by the company in connection with or ancillary to the other business.³⁸ The Supreme Court of Nigeria had occasion to construe a similarly worded objects clause in *Continental Chemists Ltd v. Dr Ifeakandu*³⁹ In that case, the Memorandum of association of the appellant company authorized it to manufacture, compound and sell drugs, medicines, perfumes and chemicals but the appellant undertook to finance the respondent’s education for a degree in medicine on the understanding that when he became a medical doctor, he would serve and practice under the appellant for five years on a special salary scale. The appellant relied on paragraph 5(e) of its object clause which empowered the company: ‘To enter into any business which the directors think will increase the profit of the company The company can do all such business and things as may be incidental and conducive to the attainment of the above objects and powers or any of them’.

Two years after the agreement was reached, the parties fell out and the respondent simply ceased to work for the appellant, arguing that the contract was *ultra vires* the company. The Supreme Court held that a declaration in the Memorandum of association that a company may enter into any business which the directors think profitable are indefinite and useless. Therefore, the transaction was *ultra vires* the company. It is obvious from the foregoing that the doctrine of *ultra vires* needed some form of reform. In the United Kingdom, the Cohen Committee on Company Law Reform stated boldly thus ‘... The *ultra vires* doctrine serves no positive purpose but is on the other hand a cause of unnecessary prolixity and vexation’⁴⁰ That report after surveying the position of the law in respect to the doctrine concludes thus ‘in consequence the doctrine of *ultra vires* is an illusory protection for shareholders and yet maybe a pitfall for third parties dealing with the company’.⁴¹

5. The Present State of *Ultra Vires* Doctrine in Nigerian Company Law

Before the examination of the present state of *ultra vires* doctrine in Nigeria Company Law, it is imperative for the purposes of clarity and emphasis, that the relevant sections of Companies & Allied Matters Act, 1990⁴² are reproduced here.

- 38(1) Except to the extent that the company’s memorandum or any enactment otherwise provides, every company shall, for the furtherance of its authorized business or objects, have all the power of a natural person of full capacity.
- 39(1) A company shall not carry on any business not authorized by its memorandum and shall not exceed the powers conferred upon it by its memorandum or this Act.
- 39(2) A breach of subsection (1) of this section, may be asserted in any proceedings under sections 300 to 313 of this Act or under subsection 4 of this section.
- 39(3) Notwithstanding the provisions of subsection (1) of this section, no act of a company and no conveyance or transfer of property to or by a company shall be invalid by reason of the fact that such act, conveyance or transfer was not done or made for the furtherance of any of the authorized business of the company or that the company was otherwise exceeding its objects or powers.⁴³
- 39(4) On the application of –
 - (a) any member of the company; or
 - (b) the holder of any debenture secured by floating charge over all or any of the

³⁷ E. Oshio (n. 4) p. 64.

³⁸ *Ibid.*

³⁹ *Supra* (n. 3).

⁴⁰ A.J. Ikpan, ‘Stimulating a Critique on *Ultra vires* Doctrine in Nigeria,’ [www.icidr.org/..... Implications%20Nigeria.pdf](http://www.icidr.org/.....Implications%20Nigeria.pdf). accessed on 22 September, 2018.

⁴¹ *Ibid.*

⁴² Companies & Allied Matters Act, 1990, Cap. C20 LFN, 2004.

⁴³ See also section 65(b).

company's property or by the trustee of the holders of any such debentures.

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

- 39(5) If the transaction sought to be prohibited in any proceeding under subsection (4) of this section are being, or are to be performed or made pursuant to any contract to which the company is a party, the court may, if it deems the same to be equitable and if all the parties to the contract are parties to the proceedings, set aside and prohibit the performance of such contract, and may allow to the company or to the other parties to the contract compensation for any loss or damage sustained by them by reason of the setting aside or prohibition of the performance of such contract but no compensation shall be allowed for loss of anticipated profits to be derived from the performance of such contract.
68. Except as mentioned in section 197 of this Act, regarding particulars in the register of particulars of charge, a person shall not be deemed to have knowledge of the contents of the memorandum and articles of a company or of any other particulars, documents, or the contents of documents merely because such particulars or documents are registered by the commission or referred to in any particulars or documents so registered, or are available for inspection at any office of the company.
69. Any person having dealings with a company or with someone deriving title under the company shall be entitled to make the following assumptions and the company and those deriving title under it shall be stopped from deriving their truth that –
- (a) the company's memorandum and articles have duly complied with;
- Provided that –
- (i) a person shall not be entitled to make such assumption as aforesaid, if he had actual knowledge to the contrary or if, having regard to his position with or relationship to the company, he ought to have known the contrary;

Section 68 abolished the doctrine of constructive notice.⁴⁴ By section 69(a), any person dealing with the company or dealing with someone that derived title from the company is entitled to presume that the company or the person that derived title from the company complied with the Memorandum and Articles of association however, a person is not entitled to make this presumption if he had actual knowledge that the company did not comply with its Memorandum and Articles of association or having regard to his position with or relationship with the company, he ought to know that the company did not comply with its Memorandum and Articles of association. Section 38(1) endows every company with all the powers of a natural person of full capacity for the furtherance of its authorized business or object. Consequently, a company can only enjoy its power like a natural person to contract, but must be within the scope of its business or object, contained in its Memorandum of association⁴⁵ Section 39(1) retains the *ultra vires* doctrine. It recognizes and affirms that a company being a creation of the statute for a specific purpose should keep within its authorized objects and powers.⁴⁶ However, the effect was whittled down by section 39 subsections (2) to (5). Section 39(3) is to the effect that even if a company exceeds its objects or powers, the act will be valid. The purport of this subsection is that where a company has executed a contract with a third party, neither the company nor the third party to the contract can bring an action to set aside the contract or transaction on the ground that it is *ultra vires*. It is of no moment whether or not the third party knew that the company acted outside the scope of its objects. In other words, a party who has performed his part of the contract can sue to enforce the performance of the other party and the defaulting party cannot plead *ultra vires* in order to avoid the obligations of the contract. This subsection made nonsense of the principle of constructive notice (notwithstanding that it has been abolished by section 68) and the exception provided

⁴⁴ The doctrine of constructive notice is to the effect that as between the company and third party, the Memorandum and Articles of association and other documents of incorporation are regarded as public document. A person dealing with a company was expected to read the public document in order to discover if the company had the capacity to do the act in question, otherwise, he was deemed to have constructive notice of the capacity of the company.

⁴⁵ N.C.S Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Lagos: Novena Publishers Ltd, 2010) p. 202.; O.V.C. Okene, 'Ultra vires Doctrine in Company Law: Truly Beaten, but not Dead,' works.bepress.com/ovunda-v-c-Okene/45/download. accessed on 22 September, 2018.

⁴⁶ J. O. Orojo (n. 2) p. 2.

thereto under section 69(a). This position is in sync with the view of eminent writers on this point⁴⁷it is important to emphasize this point because of the error most writers commit in construing this section. For instance, Ngozi Alili⁴⁸ in her article expressed the following view:

The Nigerian law has succeeded partly, but importantly, in protecting a person dealing with the company against the worst effect of the classical *ultra vires*. The company is stopped from denying liability on an *ultra vires* transaction and prohibited[sic] while the person dealing with the company may claim benefit of the transaction provided he did not know at the time the transaction was concluded that the company acted *ultra vires*. To strengthen the protection that is available to the third party, the constructive notice rule of the company's registered documents have been abolished. A person shall not be deemed to have knowledge of the contents of the Memorandum and Articles of the company, among other documents, simply because those documents are registered with Corporate Affairs Commission, or are available for inspection at an office of the company. However, the protection offered the other party to *ultra vires* transaction is not total but conditional on his having acted in good faith. He is entitled to assume among other things, that the company's Memorandum and Articles have been duly complied with, and this the company is stopped from denying, provided that he has no actual knowledge to the contrary.....The latest reform of the law in Nigeria has, with due respect to the eminent scholars and practitioners involved, left a number of other existing problems unresolved. First of all, it will have to be determined whether a particular transaction entered into by the company is *ultra vires* or not. If the transaction is *ultra vires*, it would also have to be determined if the person dealing with the company knew that the transaction is *ultra vires* the company. The process would be very tasking because of the dispute and controversy it would naturally involve. The consequence of the third party having the requisite knowledge is to deprive him of protection offered by section 39(3).

It is submitted with respect that the above view is misconceived. What section 39 subsection (3) did is to change the worst effect of *ultra vires* under common law. With the clear provision of section 39(3), once the transaction is executed, the third party dealing with the company cannot be denied the protection of law and the transaction set aside on the ground of being *ultra vires*. Section 69(a) therefore does not apply. Section 39 (2) strengthens the retention of *ultra vires* rule by providing how a breach of the rule maybe remedied. Sections 39(2) and (4) made the doctrine of *ultra vires* an internal operation of the company. Section 39(4) is to the effect that a member of the company or the holder of any debenture secured by a floating charge can invoke the *ultra vires* doctrine by making an application to the court for an injunction prohibiting the doing of the act that is *ultra vires* the company (injunction can only lie when an act has not been completed). Section 39(5) is to the effect that if the act which is intended to prohibit under section 39(4) is contractual in nature and all the parties to the contract are parties to the proceedings, the court may prohibit the performance of the contract if it deems it equitable and then may allow to the company or to the other parties to the contract compensation for any loss or damage sustained by them as a result of the prohibition of the performance of the contract, however, nobody should be compensated for anticipatory profits to be derived from the performance of such contract.

6. Present State of *Ultra Vires* Doctrine in some other Jurisdictions

Ghana

The state of the doctrine in Ghana is presently the same with Nigeria. The Ghana Companies Act, 1963 has the same provisions with Nigeria Companies & Allied Matters Act, 1990 on the doctrine.

Ghana Companies Act 1963

25(1) A company shall not carry on any business not authorized by its regulations and shall not exceed the powers conferred upon it by its regulations or this code.

⁴⁷Emeka Chianu, *Company Law* (Abuja: Lawlords Publications, 2012) p. 422. ; J. O Orojo, *Company Law and Practice in Nigeria* (5th Ed, Lagos: Lexis Nexis, 2008)p. 99.; E. Oshio, *Modern Company Law*, (Benin City: Lulupath Publications, 1995) p. 68.

⁴⁸N. Alili (n. 1) p. 181.

- 39(2) A breach of subsection (1) of this section, may be asserted in any proceedings under sections 210, 218 or 247 of this code or under subsection (4) of this section.
- 39(3) Notwithstanding subsection (1) of this section, no act of a company and no conveyance or transfer of property to or by a company shall be invalid by reason of the fact that such act, conveyance or transfer was not done or made for the furtherance of any of the authorized business of the company or that the company was otherwise exceeding its objects or powers.
- 39(4) On the application of;
- (a) any member of the company; or
 - (b) the holder of any debenture secured by floating charge over all or any of the company's property or by the trustee for the holders of any such debentures,
- the court may prohibit by injunction, the doing of any act or the conveyance or transfer of any property in breach of subsection (1) of this section.
- 39(5) If the transaction sought to be prohibited in any proceeding under the immediately preceding subsection are being, or are to be performed or made pursuant to any contract to which the company is a party, the court may, if it deems the same to be equitable and if all the parties to the contract are parties to the proceedings, set aside and prohibit the performance of such contract, and may allow to the company or to the other parties to the contract compensation for any loss or damage sustained by them by reason of the setting aside or prohibition of the performance of such contract but no compensation for loss of anticipated profits to be derived from the performance of such contract.

In 2008, the Attorney General of Ghana set up the Business Law Review Committee of Experts to offer independent advice on the reform of the business law of Ghana. At the end of its work, the Committee made ten proposals for reform which includes full abolition of the doctrine of *ultra vires*.⁴⁹

United Kingdom

In 1989, the Department of Trade and Industry, commissioned Professor Dan Prentice to undertake a review of the position and to make recommendations, and what the department described as a 'refined' (i.e, a more complicated but less far-reaching) version of his recommendation was enacted in the Companies Act 1989.⁵⁰

Section 35 provides:

- (1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in company's memorandum.
- (2) A member of a company may bring proceedings to restrain the doing of an act which but for subsection (1) would be beyond the company's capacity; but no such proceedings shall lie in respect of an act to be done in fulfillment of a legal obligation arising from a previous act of a company.

Professor Davies while commenting on the above reform stated as follows:

The 1989 reform had the merit, as far as third parties were concerned, of containing the clear statement that 'the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum. However, if the 'external' effect of the *ultra vires* doctrine was thus abolished, it continued to have effect 'internally' i.e. as between directors and the company or between shareholders and the company.⁵¹

The reform of 2006 completely abolished the doctrine from United Kingdom Companies Law. The United Kingdom Companies Act 2006 chapter 46 was enacted on 8th November 2006 but came into force in October, 2009.

Section 17 provides:

⁴⁹ R. N. A. Clogg, 'Company Law in Ghana: Beyond the Temple,' <https://www.myjoyonline.com/opinion/2015/April-20th/company-law-in-ghana-beyond-the-temple.php>. accessed on 23 September, 2018.

⁵⁰ Paul. L. Davies (n. 23) p. 154.

⁵¹ *Ibid*.

Unless the context otherwise requires, reference in the Companies Act to a company's constitution include:

- (a) The company's article and
- (b) Any resolution and agreements to which chapter 3 applies.

Section 31(1):

Unless a company's articles specifically restrict the objects of the company, its objects are unrestricted.

Section 39(1):

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

By section 31(1) of the Act, a company is no longer required to state its objects. It therefore implies that since a company does not have objects, then there will be no basis for *ultra vires doctrine*. However, companies were given the discretion to restrict their objects, but now in the Articles of association and not the Memorandum as was in the old order. Section 39(1) is of the effect that even when a company decides to restrict its object in the Articles of association, the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution [Articles of association].

The current position of law in United Kingdom is commendable. It is an evidence of pragmatic thinking and was made in order to bolster commercial transactions and economic development. With the current position, assuming the company restricted its object and the board of directors decides to enter into any transaction that is outside the objects as provided in the Articles. The shareholders of the company cannot stop the company from entering into the transaction on the ground of being *ultra vires*. The shareholders if not satisfied with the business decision of the board of director can remove the directors involved or use other internal mechanism to seek redress. But in the main, it gives room for free flow of commercial transactions and economic growth.

7. Conclusion and Recommendations

This paper has examined the *ultra vires* doctrine since the case of *Ashbury Railway Carriage & Iron Company v. Riche*,⁵² the evasive devices introduced by promoters of companies to circumvent the precarious nature of the doctrine, the current state of the doctrine in modern corporate law practice in Nigeria *vis-a-vis* other jurisdictions. The paper argued that in the light of modern day economic realities, the rule has outlived its usefulness or relevance. It stalls commercial transactions and economic development and should be completely abolished. The paper concludes that although some reforms have been introduced in Nigerian Company Law which whittled down the hardest effect of the doctrine, more still needs to be done in order to completely abolish the doctrine and give all companies unrestricted capacity.

The Companies & Allied Matters Act, 1990 although abolished the worst aspects of the doctrine of *ultra vires*, in fact retained the *ultra vires* rule in a restricted form. It is therefore suggested that the type of reform carried out in United Kingdom which birthed the Companies Act, 2006 of United Kingdom should be carried out in Nigeria. By so doing, a company maybe incorporated without an object clause. The implication is that for such a company, the doctrine of *ultra vires* become completely irrelevant, there are no objects in relation to which there can be a determination of excess of powers. Even if a company chooses to adopt restrictions on its objects, those restrictions will not affect the validity of the acts of the company. The restriction will now be made in the Articles of association as opposed to the Memorandum. It will then be completely dealt with as internal management of the company.

⁵² *Supra* (n. 10).