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Research Article

The Cogency and Justifiability of the Just-and-Equitable Grounds for Compulsory Winding-Up of Companies by the Courts in Nigeria.

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Abstract
Incorporated companies are major contributors to the industrial, social and economic growth of any nation and carry with them numerous benefits to individuals, organizations and the society at large. Indeed, any company which does not justify its existence in any given society may face the wrath of being wound up. The expense of going through the courts to obtain an order of this type indicates the determination, and this is a method often used by large creditors and the banks. Hence, this study raises, and answers questions implicated in the cogency and justifiability of the "just-and-equitable" grounds for Compulsory Winding-Up of Companies by the Courts in Nigeria. It examines the circumstances under which the court may wound up a company, compulsorily, under the Nigerian company law, those entitled to apply for the order and the consequences thereof. In conducting this study, a jurisprudential and descriptive analysis has been carried out with the help of statutes and judicial authorities. The paper found that in Nigeria the most frequently invoked ground for winding up a company is its inability to pay its debt under Section 571 (d) of CAMA, 2020. The paper suggests that since the recovery of a debt is not a relief that can be sought in a winding-up petition under Sections 571(d), 572(a) and 573(b) of CAMA, the courts should not be eager in granting a winding-up order; but must always weight all the facts and circumstances of each case before arriving at a decision, taking cognizance of the economic benefits of the continued existence of the company to the society.

Keywords: Trial Court, Incorporated Companies, Compulsory Winding-up, Insolvency, Companies and Allied Matters Act, Nigeria.

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It is interesting to note that the corporate embellishment of a company under our Jurisprudence is the power to so act as a natural person with the concurrent exercise of incidental powers associated in addition to that. Therefore, upon incorporation, a company possesses a legal personality separate and distinct from those of her promoter or directors and shareholders. This legally entrenched position enables the company to do several things which at law a natural person without such outline legal infirmities, could do including but not limited to such powers to sue and be sued in a court of competent jurisdiction, as well as the legal authority to acquire assets, borrow money and to lend same in the course of its operations.

As such, the above power is, of course, subject to the circumcised restrictions as therein contained in the company's Articles and the Memorandum of Association as well as in any existing statutes.

Interestingly, the legal personality doctrine enjoyed by Incorporated Companies today has received judicial sanction and approval in the locus classicus case of *Salmon vs Salmon & Co. Ltd* [1], which case law has now been admirably codified and succinctly provided for in our laws. For instance, Section 43(1) of the Companies Allied Matters Act, 2020, Laws of the Federation of Nigeria, hereinafter referred to as CAMA, provides in the main to the effect that:

Except to the extent that the company's memorandum or any enactment otherwise provides; every company shall, for the furtherance of its authorised business or objects, have all the power of a natural person of full capacity.

While section 42 of the same Act states inter alias thus:

As from the date of registration referenced in the certificate of the registration of the company, the shareholder of the memorandum together with such other individual as may now and then, become members of the organisation, will be a body corporate by the name contained in the memorandum, having the ability to practising all the powers and functions of a corporation including the power and obligations of a consolidated organisation including the capacity to hold land and having perpetual succession and a typical seal, yet with such ability concerning the members to donate to the assets of the organisation in the event of its being ended up as is referenced in the Act [2].

It should be appreciated at this juncture that Section 166 of the CAMA gives an incorporated company powers to borrow money to aid its day-to-day administration and or corporate undertakings. Section 166 provides the veritable borrowing platform in favour of incorporated companies and corporations as follows:

An organisation may borrow money for its business or objects and may mortgage or charge its undertaking, properly and uncalled capital, or any part thereof, and issues shares, debenture stock and different protections whether by and large or as security for any obligation, risk or commitment of the organisation or any outsider[3].

While section 571(d) of CAMA states that a company may be wound up by the court if the company is unable to pay its debts. The definition of inability to pay debts by a company is set out in the Companies Act[4]. Events, therefore, do occur where the company in furtherance of its exhaustive utilisation of the above borrowing, powers, fails, neglects and or refused to live to its financial obligation towards the lending agencies. The consequences of such default and or misapplication of the borrowing power of a company often lead to the incidence of wound up of a company by the court. Section 571 (a) (b) (c) and (e) also contains other grounds for wounding up of a company by the court, which is the concerned of this paper.

1 (1897) AC 22)
2 Section 42 of CAMA 2020
3 Section 166 of CAMA 2020
4 Section 409, CAMA

Winding-Up by The Court.

Generally, under the new Companies Act, 2020, jurisdiction has been given exclusively to the Federal High Court, unlike the 1968 Companies Act which confers jurisdiction to the State High Court. The new Act has once again raised the touchy issue of jurisdiction, and it is an issue of constitutional importance. Section 272(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

Subject to the provisions of this constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited authority to hear and determine any civil proceedings in which the existence or extent of a legal right, power duty, liability, privilege, interest, obligation or claim is in issue.…

While Section 251(1) (e) of the same constitution states that:

Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise authority to the exclusion of any other court in civil cases and matter arising from the operation of the companies and allied Matter Act or any other enactment replacing that Act or regulating the activity of Companies incorporated under the Companies and Allied Matters Act.
The author submits that a careful reading of the above provisions of the constitution shows a more definite distinction and placements vividly as to which of the two courts has the competence to decide on company matters. In the famous Supreme Court case of *Sken Consult v. Ukey*[5], an apt and clinical interpretation was provided for the phrase "operation of the Companies Act" to mean:

No more than the operation of the Companies Act about Companies incorporated thereunder. This would include the management of such companies and their assets[6].

The author contends most sincerely that causes on the company inability to pay its debts and other grounds contain in section 571 of the CAMA under which the court may order compulsory wind up of a company are subject matters which falls within the exclusive adjudicatory power of the Federal High Court. We look safe, therefore, to maintain that the appropriate court seized of the jurisdiction to entertain an action under Section 571 of CAMA is the Federal High Court.

Credence to our position is garnered from the explicit, understandable, and concise provision in Section 567 of CAMA. This provision is of greater relevance in the determination of ascertaining the proper court seized of the jurisdiction in respect of a matter arising from the operation of the Companies Act. According to Section 567 of CAMA, 'Court' or 'the Court' used about a company, means the Federal High Court, and to the extent to which application may be made to it as includes the court of Appeal and the Supreme Court of Nigeria.

The author, therefore, further holds that the phrase "subject to the provisions of the constitution "as clearly provided for under Section 272 (1) of the 1999 Constitution (as amended) was to emphasis only the provision of Section 251(1)[7]. The issuance of Debentures and the exercise of rights arising from there or companies' inability to pay their debts are guarded, regulated and governed by the enumerated provisions in the Companies and Allied Matters Act. As such jurisdiction of the exercise of rights or liabilities arising from that place resides exclusively with the Federal High Court as provided for under Section 251 (1) (e) of the 1999 Constitution (as amended). This legal axiom is anchored on the principle that State High Courts under the Nigerian

[5] (1981) NSCCI at 14
[6] Weide & Co. Nig. v Weide & Co. Hamburg (1992) 6 NWLR (Pt. 249) 627
[7] *Okulate v. Awosanya* (2000) 2 NWLR (Pt. 646) 530

Constitution assumed an unlimited jurisdictional posture but the exercise of same is genuinely and strictly regulated by:

(a) The statute, either on the subject matter of the cause of action or on to the person who can bring the lawsuit.
(b) The restriction of its plenitude either in terms of the damages in court in civil cases or the punishment it can implore in criminal cases.

Therefore, Section 251 (1) (e) of the 1999 Constitution (as amended) and Section 567 of CAMA, 2020 regulates the exercise of jurisdiction about the winding-up of companies' exclusive jurisdiction in favour of the Federal High Court.

Under segment 251 (1) of the 1999 Constitution of Nigeria (as amended) "Federal Causes" are preferable to criminal or civil causes and do relate to matter concerning which the National Assembly has the power to make laws. Therefore, the Companies and Allied Matters Act, 2004 being Federal legislation, management, control of the insolvent corporate entity and its assets is unarguably a federal cause. Adjudication in respect to it is strictly and exclusively reversed for exercised by the Federal High Court[8]. In *Tanefewa Nig. Ltd v. Plastifarm Ltd*[9], the purview of what amounts to qualifying issues within the phrase operation of the "Companies and Allied Matters Act" was recently restated to include the company's inability to pay its debts under Section 572 CAMA. Therefore, where an action or cause involves a company's failure to pay its debts or the regulation, running and or management and control of companies and its assets, the Federal High Court would be vested with jurisdiction. This is coterminous with the position that no court can effectually and effectively determine those causes without apparent recourse to the Companies and Allied Matters Act for guidance and therefore, vest Jurisdiction on the Federal High Court[10].

It is pertinent to note that the issue of jurisdiction is fundamental to the Court decides. Authority then is a threshold issue, it is, therefore, reasonable that a Court must have Jurisdiction before it can enter into the cause or matter at all or before it can make a binding order on it[11].
In the locus classiccus case of *Madukolu v. Nkemdilim*[12] the Nigerian Supreme Court stated thus on the essential ingredients for the exercise by the Court of its jurisdiction as follows:-

(a) The subject matter of the case is within its authority, and there is no feature in the case which prevents the court from performing the power.
(b) The case precedes the court started by fair treatment of law endless supply of any condition point of reference to the activity of jurisdiction.

From the preceding analysis, it is quite clear that any defect incompetence of the Court is fatal and the proceedings however well conducted without jurisdiction are a nullity[13]. Issue 5 and 32 of part 1 to the second schedule to the 1999 Constitution (as amended) places companies and related incorporation matters within the exclusive legislative list.

The paper, therefore, states that so long the subject matters of the company's inability to pay its debt and other grounds in which companies may be wound up by Court under Section 571 (a) – (f) are as specified under CAMA and reserved under Section 251(1) (e) of the 1999 Constitution (as amended), Jurisdiction to hear and determine such cases are exclusively vested in the Federal High Court.

Having discussed the court that has jurisdiction to wind up a company, it is important at this stage to examine grounds for winding up. The Companies and Allied Matters Act, as the principal legislation regulating the operations of companies in Nigeria, provides for several grounds upon which a company may be wound up by the court. A petition for winding-up of a company may, therefore, be based on any or a combination of these grounds. Specifically, section 408 of the CAMA provides that a company may be wound up by the court if.

8 Okulate v. Awosanya (2000) 2 NWLR (Pt. 646) 530
9 (2000) 3 NWLR (Pt. 650) 620
10 7UP Bottling Co. v. Abiola & Sons' (1996) 7 NWLR (Pt. 463) 744
11 Odofin v. Agu (1992) 3 NWLR (Pt. 229) 350).
12 (1962) 2 SCNLR 341
13 (Attorney General, (Fed) v. Sode (1990) 1 NWLR (Pt. 128) 500)

(a) The company has, by special resolution, resolved that the company be wound up by the court.
(b) Default is made in delivering the statutory report to the Commission or in holding the statutory meeting.
(c) The number of members is reduced below two.
(d) The company is unable to pay its debts.
(e) The court thinks that it is just and equitable that the company be wound up.[14] The winding-up of a company is a serious matter which must be based on justifiable grounds. This is because as earlier pointed out, it is generally recognized that the existence of a company carries with it several economic and social benefits to individual's organisations and the society at large. Its extinction through winding-up also terminates the flow of these benefits. It is perhaps pertinent to mention that a petition for winding up may be made to the court by the following persons, either individually or jointly: (a) the company; (b) a creditor; (c) the official receiver; (d) a contributory; (e) a trustee in bankruptcy or a personal representative of a creditor or contributory; (f) the Corporate Affairs Commission under (section 323, CAMA); and (g) receiver if authorised by the instrument under which he was appointed[15]. It is equally instructive to note that for a petition to ground a winding-up order, it must comply with the provisions of the Act and those of the companies Winding-up Rules 1983. The court must examine the petition and the accompanying affidavit and hear every person before it can determine whether a case for winding up has been sufficiently made out. Even an unopposed request does not automatically lead to a winding-up order; the court must still satisfy itself that the petition has been duly advertised and said on the relevant party or parties before ordering in the petitioner's favour can be made[16].
In light of the following, this paper sets out to analyse the legal grounds for compulsory winding-up of companies as provided under the Nigerian Law to determine their cogency and justifiability. Recommendations shall also proffer for the overall development of corporate law and practice in Nigeria.

Special Resolution of the Company for its Winding-up by the Court.

The CAMA empowers the company, which is desirous of being wound up, to pass a special resolution to the effect that the winding-up should be handled by the court[17]. The primary reason for entrusting the winding-up exercise to court is to prevent abuse of the process and serve the interest of all the parties. However, it may be contended that by resolving to have the company wound up by the court, instead of doing it by itself, the company would invariably be passing a lack of confidence vote on itself. According to Orojo, this is a rare mode of winding-up since a company in such a case would rather pass a special resolution to wind up the company voluntarily under section 457(b)[18].
The learned author further stresses the need for the special resolution for the winding-up of the company by the court to be duly passed at the company's meeting adequately and adequately convened[19]. This clearly shows that if the meeting is not appropriately and adequately convened, then its special resolution will be void[20]. This was the issue canvassed in the case of *Mercantile Bank of Nigeria Plc v. Nwobodo*[21], the court stated the position thus:

Ending up of a company by the Court starts with the passing of a resolution by the company to that effect or with the presentation of a petition for the winding up to the Federal High Court in whose area of jurisdiction the registered office or head office of the company is situated.

14 Ado Ibraham & C. Ltd, v. Benue Cement Coy. Ltd (2007) 15 NWLR (Pt. 1058) 358.
15 FMB Ltd. v. N.D.I.C. (1995)6 NWLR (Pt 400) 226
16 IMB Nig. Ltd. v. Speegaffs Co. Nig. Ltd. (1997)3 NWLR (Pt 494) 423
17 Section. 571(a), CAMA
18 Orojo, J. O. (2008) Compoany Law and Practice in Nigeria 5th edn. (Durban: Lexis Nexis) p. 450
19 Ibid
20 Section 233 (2), CAMA
21 (2003) 3 NWLR (Pt. 648) 297

Default in Holding Statutory Meeting or Deliver Statutory Report to the Commission

The failure of a company to hold its statutory meeting or deliver the legislative report to the Corporate Affairs Commission constitutes another ground for winding-up the company (section 571(b), CAMA). Section 211(1) of the CAMA provides that:

Each public company will within a half year from the date of its incorporation hold a general meeting of the individuals from the organization (in this law referred to as the legally required meeting).

This section requires a public company to hold a statutory meeting within six months from the date of its incorporation. At least 21 days before the legislative session and the directors are expected to forward a copy of the statutory report to both the member and the commission[22].

The members of the organisation present at the statutory meeting shall be at freedom to discuss any issue identifying with the development of the organisation, and its initiation of business or matters arising out of the legislative report[23]. The legitimate report shall, as far as it relates to the shares designated by the organisation, and to the cash got in respect of such shares, and to the receipts and payments of the organisation on capital record, be guaranteed as a right by the auditors of the organisation[24]. The directors must deliver a copy of the report of the Commission for registration[25]. The directors shall also cause a list showing the names, descriptions and addresses of the members of the organisation, and the number of shares held by them respectively, to be delivered at the initiation of the meeting and to stay open and accessible to any individual from the organisation during the continuation of the statutory meeting[26].

It is worthy of note that the requirement of holding a statutory meeting under section 211 of the CAMA does not apply to private companies. However, it is instructive to observe that if a private company becomes a public company by the law, it will have to comply with the provisions of Section 211 of the CAMA regarding holding a statutory meeting[27].

Where a public company fails to consent to the requirements of section 211 of the CAMA, identifying with the holding of statutory meeting, the organisation and any official in default shall be blameworthy of an offence and at risk to a fine of N50 for consistently during which the default continues[28]. The statutory meeting provides an opportunity for shareholders not only to know themselves but to also discuss serious business affecting the new company.

Since the company is expressly enjoined to hold its statutory meeting within six months of its incorporation, it becomes settled that the company cannot exercise any discretion to hold the said meeting outside the period stipulated by statute. However, the company can hold the statutory meeting out of time with the leave of the court. The company cannot unilaterally extend the time to maintain the legislative meeting for itself, but the court can grant an extension of time even where a petition for winding on this ground has been presented. This was indeed the direction of the court in the significant case of *Guardian Express Bank Plc v. Odukwu & Anor*[29], the court held that:

Under section 574(3) of the Companies and Allied Matters Act, where a case is filed on the ground of default in conveying the statutory report to the commission or in holding the statutory meeting, the court, instead of making a winding-up request, may coordinate the conveyance of the

22 Section 211(2), CAMA
23 Section. 211(8), CAMA
24 Section 211(5), CAMA
25 Section 211(6), CAMA
26 Section 211(7), CAMA
27 Mussini v Balogun (1968) 2 ALR. Comm. 197
28 Section. 212, CAMA
29 (2009) 14 NWLR (Pt. 1160) 43)

statutory report or the holding of a meeting as the case may require, and request the costs to be paid by the persons who, in the opinion of the court, are responsible for the default.

It is therefore clear, from the foregoing, that though failure to comply with the requirement of holding the statutory meeting within six months is a criminal offence punishable with a fine of N50 for every day the default continues, such default is merely an irregularity which can be cured by order of the court extending time. By this approach the company falls back on the rules of practice and procedure which enables a defaulting party to comply out of time with the provisions of a statute or order of the court, by seeking and obtaining an extension of time from the court, to perform the function even though there is no express provision for it and the court if it sees reason, instead of a winding-up request, expand the time inside which the meeting should be held or inside which the statutory report should be sent to Corporate Affairs Commission. However, the court may make an order as to costs to be paid to the petitions as it thinks fit[30]. The only instance when seeking and obtaining the extension of time might not avail an applicant is where the right or duty is taken away by effusion of time. The court can make an order even *suo motu*, granting an extension of time to hold the statutory meeting.

Reduction of Membership beyond Legal Minimum

The other issue which now calls for treatment is that relating to the reduction of members beyond the legal minimum. According to Section 93 of the CAMA, if a company carries on business without having at least two members, and does so for more than six months, every director or officer of the company during that time so carries on business after those six months, who realise that it is carrying on business with just one or no part, is liable jointly and severally with the organisation for the debts of the company contracted during that period[31].
In the same vein, a reduction of membership below this statutory minimum presents a ground for winding-up[32]. This is one of the instances where a shareholder or a contributory is expressly authorised to initiate a petition for winding-up of the company[33]. The Supreme Court of Nigeria decision in the case of *Ado Ibrahim & Co. Ltd. v. B.C.C. Ltd* [34] is instructive. It defined the term 'Contributory' as follows:

The term 'Contributory includes a fully paid-up shareholder, provided he or she has a substantial interest in the winding-up of the company, which is usually demonstrated by showing that the company has a surplus of assets over liabilities.

The Corporate Affairs Commission may also petition for the winding up of the company under this ground.
Ironically, it may be argued that the justification for this ground for winding up of companies lies in the need to observe and enforce the statutory requirements for the existence of a company in Nigeria to its membership. Accordingly, a reduction in the statutory minimum number of its members renders the company illegal as it would no longer satisfy the legal requirement that a company must have at least two members. However, a sixty day period of grace is allowed for necessary remedial action to be taken to rectify the company's membership before liability for the company's debts would start to run against its directors and officers. This would imply that the company only ceases to operate as a company after six months from the time there was a reduction in the statutory minimum number of members.

The inability of the Company to Pay its Debts

30 Section 574(3), CAMA
31 Section. 246(3), CAMA
32 Section. 93, CAMA
33 Section. 410(2) (a)(1), CAMA
34 (2010) 14 NWLR (Pt. 1160) 77

The corporation's failure to pay its debts or insolvency has been perceived as the most common ground on which petitions for the winding-up of companies are based[35]. Indeed, Gower, discussing concerning the English Companies Act, maintains that of all the grounds for winding-up of companies "the only one which needs particular mention are: (a) that the company is unable to pay its debts (the most common ground), and (b) that the court concluded that it is just and fair"[36]. This work is in total agreement with the view expressed by the eminent learned author and adds that if the petition for wounding-up is from a company's creditor and if the debt owed him remains unpaid, his desire to wind up the company must not be seen as unreasonable. Under Section 572 of the CAMA, inability to pay debt or insolvency is defined by reference to three circumstances under which a company would be deemed to be insolvent or unable to pay its debts.

(a) The first of such circumstances is if the corporation owes a lender a sum surpassing N2,000 (Two Thousand Naira) which is expected for instalment and interest has been made on the organization for instalment with the organization not having the option to pay, secure or exacerbate the obligation to the satisfaction of the bank for three weeks after the interest has been made. The essential elements which a petitioner who relies on this circumstance of inability to pay debts must prove are: (i) that there is a debt of more than N2,000 owed him by the company; (ii) that he made a demand on the company and (iii) that the company is unable to pay, secure or compound the debt to his satisfaction, three weeks after the request was made.

(b) The second circumstance where the inability to pay the debt could be established is if execution or other processes issued on a judgment, pronouncement or order of any court for a lender of the organisation is returned unsatisfied in entire or to some extent. The third circumstance of inability to pay the debt as contained in Section 409(c) of the CAMA is if the court is satisfied that the company is unable to pay his debts after considering any unforeseen or prospective obligation of the corporation.

(c) The above provisions of the law would appear to emphasise that a distinction is usually made between the idea of cash stream insolvency (powerlessness to get together with business commitments/obligations arising from the exchange with outsiders or secured loaning even though the company might be asset rich) and the broader concept of "balance sheet insolvency" which occurs where the liabilities of the company exceed the holdings of the company. Indeed, it seems quite clear that an improper case of winding up or a proper example of business rescue and turnaround is more likely to occur for a company that is cash flow insolvent. The main problem in those circumstances would not be the long-term viability of the business but a temporary delay in the cash cycle, which can be corrected through various methods and techniques. In Nigeria, liquidating a company that is not balanced sheet insolvent based on the inability to pay N2,000 after the expiration of a 21-day statutory demand notice could cause unnecessary and avoidable social upheaval and defeat the purpose of the law[37].

Under the common law, it had been held by the House of Lords that once the conditions for proving that a company is unstable to pay its obligation have been fulfilled, the company must be twisted up[38]. Where the obligation is genuinely contested, and there is reason to believe that the company has reasonable protection, the winding-up order will not be made. In *Re London and Paris Banking Corporation,*[39] right now, the company received furniture which the petitioner claimed to add up to £267. They set up a demand which was not fulfilled in 3 weeks. They filed for the ending up of the company. The company offered a barrier that they contested the obligation that is why they didn't pay. They had offered £155. However, the petitioners had refused the offer

35 Udofa, I. J (2015) , "A Critical Analysis of the Legal Framework for Control, Management and Winding-up and Rehabilitation which way Forward for Nigerian Companies" IFE JURIS (Pt. 1) p. 130

36 Gower, 1979; Section 408(d), CAMA

37 Idigbe, A (2011) "Using Existing Insolvency Framework to Drive Business Recovery in Nigeria: The Role of the Judges" being a paper presented at 2011 Federal High Court Judges Conference held at Sankurn Hotel Sokoto on 11th October 2011, https://www.insol.org/-files/Africa%20Round%20Table/using%20existing20...pdf. (Visited 18/7/2013

38 Bowes v. Hope Life Insurance and Guarantee Co. (1865) 11 H.L. Cases 389.

39 (1875) L.R.19 Eq. 444,

before filing for winding up. After the valuation, the debt was put at £187. The court held that there was a bona fide defence of disputing the £267 debt. In this circumstance, the winding-up order was refused. The Nigerian case worth mentioning under this heading is that of *Tate Industries Plc v Devcom N.B. Ltd*,[40] where the Court of Appeal cited and adopted the principle enunciated in the above English case and held that where a debt is disputed *bona fide*, an order of winding-up will not be made. In such a case, the creditor must seek his remedy in action to establish the debt. This means that where there is a genuine dispute as to the indebtedness of a company, that issue must first be resolved before the winding-up petition is continued; as a company can only be wound-up ordinarily where it is for example insolvent. Another case that best illustrates the above principle is that of *Air Via Ltd v Oriental Airlines Ltd,*[41]. Recently, the Supreme Court of Nigeria stated the essential ingredients requiring the court to wind up a company under section 571 (d) as (a) there must be an existing debt; (b) the debt is due; (c) a formal demand is made and (d) the company is unable to pay.

Furthermore, in *Hansa International Construction Ltd. v. Mobil Producing Nigeria*[42], the petition was found on an amount which the petitioner alleged unilaterally expended and from penalties unilaterally calculated by the petitioner. Upon the respondent's denial and counter-guarantee, the appeal was dismissed on the ground that the debt was founded on an alleged breach of the agreement and sounding in damages and disputed.

On the importance of what establishes a valid blue disputed debt, the English Court in the old instance of (Re Great Britain Mutual Life Assurance Society [43] held along these lines:

As I would like to think, it isn't adequate for the respondents upon an appeal of this kind, to state, we dispute the case. They should present an at first sight case which satisfies the court that there is something which should be tried, either before the court itself, or in any action, or by some other proceeding.

In the same vein, in *Onochie v. Alian Dick & Co. Ltd.,*[44] the petitioner based his case on an alleged debt arising from retirement benefits. The respondent argued that (i) the petitioner had upon the termination of his employment absconded with respondent's property worth millions, and (ii) there was no basis for determining how the appellant computed the alleged aggregate debt as retirement benefits. The application was refused on the ground that there was a substantial dispute as to the alleged liability.

As we have observed above, where the debt is disputed bona fide, the petitioner/creditor must seek his remedy in action for the recovery of the debt, because until the issue of the companies' liability is resolved, it cannot be said for sure that the company is indebted to the petitioner.

However, the feeling of the Supreme Court in the recent case of *Ado Ibrahim & Co. Ltd v B.C.C Ltd*[45] is very instructive and illuminating. The court observed:

That a Court will not decline to entertain a petition from a creditor for winding-up a company that is unable to pay its debt because there is a mere dispute as to how much the company owes the creditor.

In other words, it is not in all cases where there is a dispute as to the amount owed by a company that a court of law will refuse a petition for winding-up of the company on the grounds of inability to pay its debt. On the other hand, where the debt in issue is colossal such that the assets of the company, if left untouched, will not in the nearest future, having regard to galloping inflation, be sufficient to pay off the debt, when they are realized, justice demands that the court exercises restraint in acceding to a winding-up prayer and wait for the determination of the suit relating to the disputed debt.[46]

Similarly, Orojo, submits that if the dispute is mere as to the precise amount owed and not a repudiation of the debt, then the court, on finding that the company is insolvent, should not refuse

[40] (2004) 17 NWLR (Pt. 901) 182
[41] (2004) 118 LRCN 4097
[42] (1994) 9 NWLR (Pt 366) 76
[43] (1880) 16 Ch.D 246 at 253
[44] (2003) 11 NWLR (Pt 832)45
[45] (2007) 15 NWLR (pt. 1058) 538.
[46] Air Via Ltd v Oriental Airlines Ltd (2004) 9 NWLR (Pt. 878) 298.

to make the order for winding-up on the ground of inability to pay the debt[47]. This is consistent with the decision of Phowman J. in the English case of *Tweeds Garages Ltd,*[48] where His Lordship aptly stated as follows:

Moreover, it seems to me that it would in many cases, be quite unjust to refuse a winding-up order to petitioners who have not been paid merely because there is a dispute as to the precise amount owing… In the present case, being, as I have said, satisfied that the company is insolvent, I think that it would be wrong to put these petitioners to the trouble and expense of qualifying the precise amount, which is owning to them in other proceedings, and in all the circumstances, in this case, I propose to make the usual compulsory winding-up order.

The fact that a company is indebted to some other companies, organisations, corporations or persons, not necessarily to the petitioner would not be conclusive evidence of its inability to pay the debt. It follows conversely, too, that the fact that a company is wealthy with a solid asset base would not stop a court from winding it up on the ground of inability to pay. There must be an inability to pay. This requirement is satisfied upon proof that a company is insolvent when a bill of acceptance was dishonoured and confirmed to be unpaid afterwards[49]. Therefore, if a cheque for N50,000 in favour of a creditor, is dishonoured and the cheque continued to be unpaid, it would be immaterial that the company possesses N100 million in another bank.

The Just and Equitable Ground for Winding-up of Companies

By section 571 (f), a company may be wound up if, in the opinion of the court, it is and equitable to do so. A petition under this ground may be brought if it becomes impossible to achieve the objectives for which the company was formed[50], or if fraud or continuous oppression of the minority is alleged[51]. Speaking generally, winding up on the just and equitable ground is an open-ended ground. The door of what constitutes a just and fairground is left for the court to decide depending on the circumstances of each case. On this ground of winding-up of companies, Gower[52] notes that:

But putting the company into liquidation may itself provide a means of remedying a situation which has become intolerable, and winding-up may be ordered if it is one peculiarly appropriate for us in such circumstances; under the Insolvency Act, the court may order the company to be wound up if it thinks that it is "just and equitable" to do so.

It is significant to note that under sections 122 and 124 of the English Insolvency Act, 1986, a contributory may petition that a company be wound up by the court and where the court accepts that it is merely impartial that the company should be wound up, the court may order winding-up[53]. The only and fairground for winding-up a company is the effective statutory remedy available to minority shareholders[54].

It was held by Megarry J. in *Field Bros Ltd,*[55] that in exercising the just and equitable jurisdiction, regard must be had to 'the settled and accepted course of conduct between the meetings, regardless of whether cast into the mould of an agreement as well as to the Articles themselves. It is therefore apparent that a potential basis for a winding-up order under the just and equitable

47 Orojo, J. O. (2008) Compoany Law and Practice in Nigeria 5th edn. (Durban: Lexis Nexis) p. 450
48 (1962) Ch. 406.
49 Globe New Patent Iron & Steel Company 20 Es. 337
50 *Re: Crown bank (1890) 44 Ch. D. 634*
51 *S.H.O Williams (junior) & Anor v. J. Olabode Williams (1995) 2 S.C.N.J. 26*
52 Gower, L.C.B. (1979), Principle of Mordern Company Law 4th Edn. (London: Stevens & Sons) p. 721
53 Morse, G (1991), Charlesworth and Morse Company Law (14th edn. London: Sweet & Maxwell) pp. 449-450
54 Section 300-313, CAMA
55 (1970)1 All E.R. 923

clause existed[56]. However, the conduct of the petitioner himself may well be relevant,[57] as he who comes to equity must come with clean hands.
It is the court that decides in any given situation what is just and equitable[58]. However, there are certain well-recognized instances in which a company may be wound-up under the and fairground. These instances are not exhaustive, and the court would be ready to accept new ones[59].

Failure or Loss of Substratum

The failure or loss of the substratum or foundation of the company's business will constitute a ground for the winding-up of the company. The implication is that a company that is no longer able or has never been able to carry on the business for which it was formed, is liable to be wound-up on the "just and equitable" ground[60]. Thus, where at the formation of the company, it was or after that become, impossible or illegal, to achieve the main objective for which the company was formed, then the company would be wound-up.
In *German Date Coffee Co,*[61] a company formed to produce coffee under a German patent was wound up when it failed to obtain the Patent, even though the company was successfully producing coffee under a Swedish patent and even though the majority of the shareholders were in favour of continuing. The position in Nigeria is not different. Though under the CAMA, *ultra vires* actions of the company are no longer void, it is noteworthy that the *ultra vires* concept has not been abolished[62], and a member can successfully challenge the decision of the company to enter into an illegal or *ultra vires* transaction which can result in the winding up of the company[63].

Conviction of Body Corporate for Certain Crimes

It is interesting to note that several statutes have introduced a new ground for winding up of companies in Nigeria, namely, conviction of a body corporate for an offence under the respective statutes. Some of the statutes which have made provision for winding-up of convicted companies include the Money Laundering (Prohibition) Act, 2010, the NDIC Act, the National Drug Law Enforcement Agency (NDLEA) Act, Asset Management Corporation of Nigeria (AMCON) Act, and the Advance Fee Fraud and other Fraud Related Offences Act. In 2008, the NDLEA arraigned both the Production and Quality Assurance Manager of *My Pikin Baby Teething Mixture* in the Federal High Court, Lagos for producing fake drugs which caused the death of 80 babies in 2008 after taking the drugs. After the evidence of parties, the court in its decision delivered on May 18, 2013, ordered the wounding up of *Barewa Pharmaceutical Ltd*, the manufacturer of *My Pikin Baby Teething Mixture* which was found to have caused the death of 80 babies in 2008 after taking fake drugs produced by the said company. The court went further to sentence two of the company's employees to a total of 28 years imprisonment. The Production Manager, Mr Adeyemo Abiodun and the Quality Assurance Manager, Egbele Eromosele, were convicted for conspiracy and sale of dangerous drugs. It is submitted with respect that this is a landmark decision and is highly commendable because the decision is in *pari materia* with what is obtainable in other jurisdictions. It is hoped that if two or more of such decisions are forthcoming, they will go a long way to check

56 Per Lord Wilberforce in Ebrahimi v Westbourne Galleries (1973) AC 360
57 L. S. Sealy, cases, and Material in Company Law 4th edn. (London: Butherworths, 1989) p. 546
58 A. Emiola, Nigerian Company Law (Ogbomoso: Emiola Publishers, 2007) p. 464
59 According to Karibi Whyte. "the category of causes for a petition on this ground (just an equitable ground) is not exhausted"Re: Pureway Corporation Nig. Ltd (1978)2 LRN 70) at 74
60 Farrar, Op. Cit pp. 458-459
61 (1882) 20 Ch D 169 CA
62 CAMA, Section. 39(1) provides that"A company shall not carry on any business not authorized by its memorandum and shall not exceed the powers conferred upon it by its Memorandum or this Act'; while CAMA, Section 39(2), Section 300(a) enable aggrieved members to sue to restrain the company from engaging in illegal or ultra vires transactions.
63 CAMA, Section 39(2), Section 300(a).

the incessant corporate killings and will act as a deterrent to other companies operating on the shores of Nigeria[64].

The above provision makes the conviction of a body corporate for an offence under the Act of a new ground for winding-up of an organisation corporate. Also, section 54(4) of the Asset Management Corporation of Nigeria Act provides that: The conviction of a body corporate for any of the offences under subsection (1) (2) of this Act shall be a ground for winding-up of the affairs of that body corporate. The absence of the requirement of forfeiture of the asset of the convicted company to the Federal Government, as contained in the other Acts may be explained by reference to section 52(5) of the said Asset Management Corporation of Nigeria Act, which provides that: Any winding-up order made against any debtor company under this Act shall be deemed to have been made under the Companies and Allied Matters Act and the provisions of the Companies and Allied Matters Act shall effect with such codifications as are contained in this Act.

In the light of this provision, it is submitted that the winding-up proceedings and distribution of the assets of the company in winding-up on the ground of conviction for a crime under the Asset Management Corporation of Nigeria Act, will be conducted by the provisions of the CAMA.

Revocation of License of a Bank

The Bank and other Financial Institutions Act (BOFIA) recognises the revocation of the operational license of an ailing bank by the Central Bank of Nigeria, as a ground for an application to be made to the court for compulsory winding up of the bank[65]. Thus, section 40 of the BOFIA provides that: "where the license of a bank has been revoked according to section 39 of this Act, the Corporation shall apply to the Federal High Court for a winding-up order of the affairs of the bank". However, before the revocation of its license, the ailing bank would have been given the opportunity for rehabilitation through the appointment of the Nigeria Deposit Insurance Corporation (NDIC) as the controller/manager of the sick bank. It is only when restoration of the ailing bank is not possible that the NDIC would recommend the revocation of the bank's license to the Central Bank. The power to revoke the operational license of a failing bank is therefore vested in the Central Bank of Nigeria and not in its Governor[66]. Where the license of a bank has been revoked, the NDIC shall apply to the Federal High Court for a winding-up order of the affairs of the bank. It is noteworthy that the operational license of a bank cannot be revoked arbitrarily. The Central Bank of Nigeria must be satisfied that rehabilitation of that bank has become impossible before revoking its operational license.

Complete Deadlock

Deadlock is meant the inability of the company or its board of directors to function owing to internal squabbles[67]. Deadlock may exist where shares are equally divided between members of two groups of members who have become irreconcilable with the result that business can no longer be effectively carried on. In[68] two cigarette manufacturers and tobacconists formed a private company in which they were the only shareholders and directors. It was agreed that disputes should be referred to arbitration. Things got worse and some of the matters were referred for adjudication resulting in the award of claims against one of the shareholders who refused to affect the award. An action for fraudulent misrepresentation was brought by one of the shareholders against the other. The shareholders became so hostile to each other that communication broke down completely. The only channel of conversation was the secretary to the company. The court held that such situations amounted to complete deadlock, and it was just and equitable to wind up the company.

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64 Olarinde E. & Idem, U., Corporate Manslaughter Law in Nigeria: A Comparative Study, Beijing Law Review, 2020 at p.372

65 Section 12(d), BOFIA Cap B3 LFN, 2010

66 Udofa, I. (2015) , "A Critical Analysis of the Legal Framework for Control, Management and Winding-up and Rehabilitation which way Forward for Nigerian Companies" IFE JURIS (Pt. 1) p. 130

67 Emiola, A. (2007), Nigerian Company Law (Ogbomoso): Emiola Publisher) p. 464.

68 *Yenidji Tobacco Co Ltd* (1916) 2 Ch 426,

It is instructive to note that the petitioner who asserts that there exists a deadlock[69] must prove this on the balance of probabilities. This means that the petition would be dismissed in the absence of clear proof or the presence of vexatious and frivolous allegations. The particulars of the disagreement must be exhibited in the request to help the court in reaching a reasonable conclusion.

The courts have also held that it is equitable to wind up a small company where there is a serious disagreement between the members and the directors. Adverse relations between the members and directors could be shown from the circumstances of the case, including the fact that the business is no longer being carried on by certain persons uniquely elected as directors[70].

Conclusion and Recommendations

It has been shown in this paper that the CAMA and several other Nigerian statutes have provided for the grounds for the winding-up of companies in Nigeria. Indeed, while the CAMA contains the traditional grounds, namely, special resolution by the company for its compulsory winding-up, reduction in the minimum number of members, failure to hold a statutory meeting and make statutory returns, inability to pay its debts, and just and equitable ground. The BOFIA provides for the revocation of the operational license of a failing bank as a new ground for winding-up of the bank which is primarily a company. Other statutes, such as the NDIC Act, the National Drug Law Enforcement (NDLEA) Act and the Asset Management Corporation of Nigeria (AMCON) Act have also provided for another new ground for winding-up a company; namely, the conviction of a body corporate for any offence under the respective Acts. Except under the AMCON Act, the assets of convicted and wound-up companies are to be forfeited to the Federal Government. The paper also showed that of all the grounds under which the court may wind up a company the most frequently invoked ground is the company inability to pay its debts under section 571 (d) of CAMA 2020.

The paper further analyses the cogency and justifiability of the grounds for the winding up of companies against the need for the company's continued existence.

This paper recommends that the inability of the company to pay its debts, being the most used invoked ground for winding-up, should be adequately and restrictively defined under section 572. Accordingly, Section 572 of CAMA 2020 which is the definition section of what constitutes an inability to pay debts to be amended to read thus:

The company's failure to pay debts does not include matters relating to debt arising from employment and or retirement benefits, breach of contract and other auxiliary claims.

Also, the law should clearly state the range of ingredients of what the creditor must establish for him to succeed in a case based on section 571. It is also suggested that the court being the last hope of the common man and the society should not be eager in granting a wound-up order; but must always weight all the realities and conditions of each case before arriving at a decision, taking cognisance of the social and economic benefits of the continued existence of the company to the society and more importantly, the fact that such a company could be rehabilitated instead of being wound-up.

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[69] (1971) 1 All NLR 247
[70] Stevedoring Nig. Co. Ltd. (1962) LLR 164

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"I, as the Corresponding Author, declare and undertake that in the study titled "The Cogency and Justifiability of the Just-and-Equitable Grounds for Compulsory Winding-Up of Companies by the Courts in Nigeria.", scientific, ethical and citation rules were followed; the Journal Editorial Board has no responsibility for all ethical violations to be encountered, that all responsibility belongs to the author/s and that this study has not been sent to any other academic publication platform for evaluation."

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