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Company promoters and pre-incorporation contracts: Delimiting the boundaries of liability under section 96 of the Nigerian companies act 2020

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Abstract
Section 96 of the Nigerian Companies Act 2020 provides for pre-incorporation contracts and liability under the contract before and after the company is incorporated. This article critically analyses the statutory provisions and identifies the boundaries and the shifting of liability for pre-incorporation contracts. It finds that the boundaries of liability are unfairly constructed around the company promoters as they are personally liable for pre-incorporation contracts to an extent that reflects the common law position which the provisions of the section were meant to reform; liability does not shift away from the promoter to the company except when the company decides to ratify, and there is no remedy provided under the section by which the promoter can compel, in deserving circumstances, a shift of liability to the company. In order to ensure fair and equal protection for all parties to a pre-incorporation contract in Nigeria, this article suggests amendment to section 96 and offers useful recommendations to allow appropriate shifting of liability from the promoters to the company upon incorporation.

Keywords: company promoters, pre-incorporation contracts, section 96, cama 2020, contractual liability, incorporated companies

Introduction

The legal personality which a company acquires upon incorporation confers it with power to enter into contracts with other parties towards achieving its objects of incorporation. Until a company is incorporated it remains a mere business conception and lacks the corporate existence, power of perpetual succession and a common seal necessary to effectuate contractual relations [1]. However, the initial process that leads to the incorporation and take-off of a company as a going concern often involves the promoters of the company entering into contracts in the name, or on behalf, of the company before its incorporation. Such pre-incorporation contracts implicate both fundamental principles of company law and the law of contract, and have for a long time presented complex issues of fixing liability amongst parties to the contract.

Generally, an unincorporated company lacks the legal status to enter into contract directly or through an agent [2], and a party not privy to a contract cannot take the benefit or burden of such contract [3]. At common law, liability for pre-incorporation contracts was apportioned based on these fundamental legal principles and with disparate outcomes. The inconsistency in the common law rule of fixing liability for pre-incorporation contracts either led to promoters' general liability as established in the case of *Kelner v Baxter* [4], or the unenforceability of the entire contract as held in *Newborne v Sensolid (Great Britain) Ltd* [5]. Given the significance of a pre-incorporation contract and the need to properly address the issue of liability as it concerns all parties involved – the promoters, the company and third parties – different jurisdictions have enacted statutes that expressly stipulate liability for pre-incorporation contracts [6]. In Nigeria, the Companies and Allied Matters Act 2020 (the CAMA 2020) provides in its section 96 for pre-incorporation contracts and to whom liability is attached at different stages before and after the company is incorporated. Unarguably, and like in other common law jurisdictions, Nigerian statutory provisions are influenced by common law evolution of pre-incorporation contracts and the issue of apportioning liability; at least, to the extent that the statutory provisions either seek to improve on the common law position or clearly set out how and where liability for pre-incorporation contracts should reside amongst the three parties concerned.

This article critically examines the provision of section 96 of the CAMA 2020 with respect to how it attaches liability for pre-incorporation contracts. From the statutory provisions, this article identifies the boundaries of liability for pre-incorporation contracts, and determines whether the shifting of liability after incorporation provides equal protection for all parties. In the first part of this article, pre-incorporation contracts are examined from the original common law approach, and the legal principles that underpinned the attachment of contractual liability.

The second part critically analyses the provisions of section 96 of the CAMA 2020 and determines how liability for pre-incorporation contracts is attached, and whether the shifting of liability accords equal protection to the promoters, the company and third parties. In conclusion, this article offers useful recommendations towards future amendment of the extant statutory provisions in order to ensure equal protection for all parties involved in pre-incorporation contracts in Nigeria.

Company promoters and liability for pre-incorporation contracts

As a preliminary definitional clarification, a company promoter is "one who undertakes to form a company with reference to a given project, and who takes the necessary steps to accomplish that purpose'' [7]. Promoters are

therefore persons who conceive and bring a company into existence as a legal entity to carry out stated business objectives. The company promoters may become shareholders and first directors of the company after incorporation. This distinguishes a promoter from persons engaged in a professional capacity to procure the formation of a company, such as solicitors who are engaged to file the necessary documents at the companies' registry leading to the issuance of a certificate of incorporation [8]. The position of company promoters give them the prerogative to decide the business objects and contractual relations of a company that is not yet incorporated.

Depending on the type or object of business of the proposed company, promoters of the company may find it necessary to enter into lease agreement to secure office apartment or business space, contract for the supply of goods and services, production or operational facilities, including service contract for managing director and other essential officers of the company. For the purpose of raising adequate capital for the business undertaking of the proposed company, promoters may also conclude shares subscription and shareholders agreement, including joint venture agreements. These and other types of pre-incorporation contracts play a necessary and foundational role in the process of establishing a company as a going concern.

However, in spite of its practical business necessity a pre-incorporation contract remains what it is; a contract in the name or on behalf of a company that is not yet in existence as at the date the contracted is consummated. Though a pre-incorporation contract is made in the interest and for the benefit of the proposed company; mainly to enable it commence business and actualise its object of incorporation, the company is however not a party to the contract. Usually, a promoter may enter into a pre- incorporation contract either in the name of the company or in the personal name of the promoter as an agent of the unincorporated company. In either case, it will become necessary to determine liability for the pre-incorporation contract where and when a breach of the contract occurs, such as where the company is never incorporated or where the company fails to ratify and adopt the contract after incorporation.

In view of the law of contract and the rule of agency, determining liability in pre-incorporation contracts is not a simple and straightforward legal task. As stated earlier, the provisions of section 196 of the CAMA 2020 were not couched without the knowledge of how liability for pre-incorporation contracts was determined at common law. Statutory provisions are almost always a form of legal intervention to cover a *lacuna* in existing law, or to clarify, strengthen or supplant the common law position where there is inconsistency, weakness or archaism in the law. Until the enactment of the CAMA 2020, liability for pre-incorporation contracts was determined based on the established common law rules and principles. Therefore, in order to fully appreciate the scope and objective of the provisions of section 196 of the CAMA 2020, it is apposite to examine how liability for pre-incorporation contracts was determined under common law.

Liability for Pre-incorporation Contracts under Common Law

It is now trite law that a company does not have any legal existence before its incorporation, even as promoters execute pre-incorporation contracts in the name or on behalf of a company that is yet to be incorporated. But generally, pre-incorporation contracts are executed by the company promoters with the expectation that the contracts, been in the interest and for the benefit of the company, would be ratified and adopted by the company upon incorporation. However, under common law a company is not capable of ratifying and adopting a pre-incorporation contract based on the law of contract which precludes a party from ratifying a contract if the party lacked the requisite legal capacity to be bound by the contract at the time it was executed [9]. The company, having not been in existence at the time a pre-incorporation contract is made in its name or on its behalf, also lacks the power of a principal to ratify a pre-incorporation contract purportedly made by its agents, the promoters [10].

The common law rule that a pre-incorporation contract cannot be ratified and adopted by a company after its incorporation was conceptualised in the 19th century case of *Kelner v Baxter* [11]. In that case, a promoter entered a pre-incorporation contract for the supply of wine to the company that was yet to be incorporated. When the company failed to pay for the wine even after its incorporation, the supplier sued the promoter for the payment of the value of the product. The court held that in accordance with the legal rule of agency which requires a principal to be in existence and capable of contracting at the time of the contract, it followed that a promoter cannot contract as an agent for a non-existent company as a principal. And that the company cannot take liability for a pre-incorporation contract by ratification and adoption of the contract since the company was a stranger to the contract.

Consequently, the promoter, as the party to the contract, was held personally liable for the pre-incorporation contract. In the case, Erle CJ ruled that in pre-incorporation contracts the promoters' liability would subsist even if the company purportedly ratified and adopted the contract after incorporation [12]. The case of *Kelner v Baxter* thus established the common law rule that promoters would always be personally liable for pre-incorporation contracts. In spite of its rigidity and unconscionable outcome, given the business necessity of pre-incorporation contracts and its benefit to the successful take-off a company, the authority of *Kelner v Baxter* endured until after about a hundred years later when it was somewhat distinguished in the case of *Black v Smallwood* [13], but with more or less unconscionable outcome.

In the *Blackwell's case* the court held that the authority of *Kelner v Baxter* did not establish a categorical rule that promoters would always be personally liable for pre-incorporation contracts, but that promoters would only be liable if the parties to the contract have such common intention. According to the court, ''it was not the intention of the parties when the contract was made that, persons who signed as directors should be personally liable". Therefore, in determining liability for pre-incorporation contracts based on the common intentions of parties to the contracts, the court would need to consider the surrounding facts and circumstances in order to presume the most appropriate intentions of the parties.

Determining liability for pre-incorporation contracts based on the common or presumed intentions of parties to the contracts created a climate in which promoters and third parties contracted under tremendous uncertainty as to their

legal rights and obligations [14]. For instance, the party contracting with the promoter is likely to intend that liability for the contract is to be borne by the company, as the beneficiary of the contract, and the promoter, purporting to act as an agent for the proposed company, would not intend to incur liability for the contract. Thus, as noted by Puri, the intentions analysis was unfair and unjust as it often attached liability for loss under the contract to third parties since "a great deal may turn upon the form of a contract, and minor differences in wording may be decisive of the rights and liabilities of the parties [15]." Following *Blackwell v Smallwood*, one method the court used to ascertain the common intention of the parties was to examine the promoter's form of signature appended on the contract document. But this method led to an unfair, unjust and unconscionable outcome in the case of *Newborne v Sensolid (Great Britain) Ltd* [16].

In *Newborne v Sensolid (Great Britain) Ltd*, a company that was yet to be incorporated sold a quantity of ham product to a third party and the promoter of the company signed for the company. When the buyer refused to take delivery of the product, the company sued for breach of contract. In order to determine liability for the contract based on the parties' intention, the court decided that the promoter's form of signature on the contract document had to be considered. The court arrived at the conclusion that because the company's name came before the promoter's name, the intention was to bind the company, and not the promoter. If otherwise, it would suggest an intention to bind the promoter personally. The court stated that since the promoter's name came below that of the company, it meant the promoter did not sign as an agent but as a director of the company merely authenticating the company's signature.

The conclusion of the court's analysis of the form of the promoter's signature was that the parties intended that only the company would be bound by the contract. And since the company was not incorporated and in existence at the time the contract was made, it implied that there was no valid and enforceable contract upon which the company could bring an action for breach. The promoter could not also maintain an action as a non-party to the contract. The case of *Newborne v Sensolid (Great Britain) Ltd* extended the common law rule on liability for pre-incorporation contracts even beyond the confines of the original position in *Kelner v Baxter*. In the latter case, the court reasoned that since the contracting parties must have intended that someone would be liable for the contract, and the company was not yet incorporated, it therefore implied that the promoter must be personally liable for the contract.

Unlike in *Newborne v Sensolid (Great Britain) Ltd*, the *Kelner v Baxter's* Court of Common Pleas refused to hold the pre-incorporation contract invalid and unenforceable on the reasoning that the contract should be construed in order for it to be effective rather than void. Thus, since the promoter negotiated and signed the pre-incorporation contract it is logical to give effect to the contract by holding the promoter personally liable. The decision in *Newborne v Sensolid (Great Britain) Ltd* has been criticised as being unsound both in logic and principle since it treated the promoter who signed for the company as an integral part of the same company it held to be non-existent at the time of the contract [17]. More than two decades after *Newborne v Sensolid (Great Britain) Ltd* was decided, the inconsistent common law rule on liability for pre-incorporation contracts was however clarified by Lord Denning in the case of *Phonogram Limited v Lane* [18].

In Phonogram Limited v Lane, the promoter of a company with the object of managing a pop artists group entered into a contract for financial sponsorship from a recording company. The money paid by the recording company under the contract became due while the proposed company had not been incorporated. In an action by the recording company against the promoter, Lord Denning distinguished and clarified the preceding cases of *Kelner v Baxter*, *Blackwell v Smallwood* and *Newborne v Sensolid (Great Britain) Ltd* but nevertheless, held that the promoter was personally liable for the pre-incorporation contract. Instructively, the decision in *Phonogram Limited v Lane* was based on the interpretation of a statutory provision which expressly provided for liability for pre-incorporation contracts under section 9(2) of the European Communities Act 1972 (the ECA) [19]. According to Lord Denning, from the provisions of the section, company promoters are liable for pre-incorporation contracts unless there is a clear and express exclusion of the promoters' liability.

The general rule of promoters' liability for pre-incorporation contracts and the exceptional ground of express exclusion of liability as provided in section 9(2) of the ECA, and interpreted by Lord Denning in *Phonogram Limited v Lane*, have since been statutorily adopted by the United Kingdom, a foremost common law jurisdiction [20]. The UK statutory intervention in the common law rule on liability for pre-incorporation contracts now attaches liability for pre-incorporation contract solely to company promoters but ''subject to any agreement to the contrary'' [21]. It needs to be pointed out that the UK statutory provision has a lot in common with the common law rule as it does not recognise the power of ratification and adoption of pre-incorporation contracts by the company after incorporation. It does not also relieve company promoters of liability even where the company, after its incorporation, purports to ratify and adopt a pre-incorporation contract. The only case in which promoters may escape liability is where the parties expressly agreed to that effect in the contract.

However, under an extant common law principle, promoters may avoid liability for pre-incorporation contracts when there is a novation; when a company, after incorporation, enters a fresh contract with the third party but under the same terms and conditions as in the original pre-incorporation contract. The UK statutory intervention has not altered this long-standing common law principle established in *Howard v Patent Ivory Manufacturing Co'* [22]. Novation is to the effect that the company, after incorporation, is substituted for the promoter as a party to the contract in all its essential respects; the company takes over the contract with the third party and thereby relieves the promoter of liability under the contract [23]. But generally at common law, liability for pre-incorporation contracts permanently attaches to company promoters who execute the contract, even if the company purports to ratify and adopt the contract after incorporation.

Liability for pre-incorporation contracts under section 96 of the Cama 2020

Prior to statutory provisions on liability for pre-incorporation contracts in Nigeria [24], the common law position established in *Kelner v Baxter*, and extended in *Newborne v Sensolid (Great Britain) Ltd* was recognized

and applied. The earliest Nigerian case appears to be *Caligara v Giovanni Sartori & Co Ltd* [25] where a company promoter obtained a loan in the name of the company yet to be incorporated. When the creditor sued for repayment after the company was incorporated the court held that the loan transaction could not be enforced against the company, neither could the company have ratified the transaction since it was made before the company was incorporated. According to the court, since the loan was granted at the time the company was not in existence the 'Plaintiff's claim must fail' [26].

A decade later in the case of *Enahoro v Bank of West Africa Ltd* [27], a bank had granted loan to the promoter of a proposed company, and the loan indebtedness was transferred to the company after incorporation, and was duly ratified by the company. Another loan was subsequently obtained by the major shareholder on behalf of the incorporated company. While the court held the company liable for the subsequent loan, it however ruled that the company could not be held liable for the pre-incorporation loan even when the company had ratified the loan transaction. The court maintained that ratification of a pre-incorporation transaction by the company after incorporation could be valid only if the third party consented to the ratification in the form of a novation. Since the pre-incorporation loan transaction was not novated, though ratified, it meant it was not binding on the company to incur liability for the loan.

These common law principles on liability for pre-incorporation contracts and the nullity of ratification of such contracts after the company is incorporated were reaffirmed in later years in the cases of *Edokpolo v Sem-Edo Wire Industries Ltd* [28] and *Transbridge Co. Ltd. v Survey International Co. Ltd* [29]. The common law position therefore remained the applicable law in Nigeria up until 1990 when the erstwhile Companies and Allied Matters Act was enacted [30]. It is the provisions of section 72 of the 1990 Act that are reproduced verbatim under section 96 of the CAMA 2020. Statutory provisions for liability for pre-incorporation contracts in Nigeria implies that the common law position was considered to be either inadequate or unsatisfactory. Therefore, the object and effect of the statutory provisions have to be remedial towards correcting the defect or shortcoming of the common law position. One clear deficiency of the common law position is that it holds company promoters generally liable for a pre-incorporation contract, whether or not the contract is ratified by the company after incorporation. But according to section 96 of the CAMA 2020;

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 or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit there of.

From the above provisions of section 96, the following three points can be noted; (1). Pre-incorporation contracts may be ratified by the company after incorporation, (2). Until ratification of a pre-incorporation contract company promoters are personally liable for the contract, and (3). Company promoters may avoid liability for pre-incorporation contracts through express agreement. The provisions of section 96 are therefore a radical departure from the common law position to the extent that liability for pre-incorporation contracts by company promoters is qualified; liability does not attach where the company ratifies the pre-incorporation contract and where the company promoter enters an express agreement to avoid liability.

Without a doubt, therefore, section 96 of the CAMA 2020 significantly improves on the common law position in that it does not permanently attach liability for pre-incorporation contracts to company promoters. However, the provisions of the section have similar objective with the common law position. That is, the protection of third parties to pre-incorporation contracts as showed in the case of *Kelner v Baxter* (where the company promoter was held personally liable), and the protection of the company as in the case of *Newborne v Sensolid (Great Britain) Ltd* (where the pre-incorporation contract was held unenforceable against the company).

There does not appear to be a deliberate attempt to protect company promoters who enter pre-incorporation for the benefit of the company. Liability for pre-incorporation contracts under section 96 generally remains with company promoters except there is a ratification or an express agreement to avoid liability. The general liability of company promoters is further reinforced under the provisions of the CAMA 2020 which place promoters in a fiduciary relationship to the company with respect to any contracts or transactions entered on behalf the company [31]. Thus, the company promoters would be fixed with liability for pre-incorporation contracts where the company fails, refuses or neglects to ratify the contract after incorporation, and where an express agreement to avoid liability breaches the fiduciary obligation the promoters owed to the company. It is submitted that in fixing liability for pre-incorporation contracts the provisions of section 96 of the CAMA 2020 hardly allow liability to shift away from the company promoters.

Shifting of Liability and Equal Protection under Section 96 of the CAMA 2020

The provisions of section 96 of the CAMA 2020 make a company promoter to be personally liable for a pre-incorporation contract where the company does not ratify the contract. Except through an express agreement by the promoter, the section does not provide for the shifting of liability away from the promoter to the company even where the company takes full benefit of the pre-incorporation contract and fails to ratify it. It is noteworthy that the qualification of the liability of company promoters by ratification and express agreement is not original to the provisions of section 96 of the CAMA 2020. Exact provisions were first made under section 20 of the Ontario Business Corporation Act 1970 (OBCA) which provided that a corporation may adopt pre-incorporation contracts, and that until the corporation adopts the contract, the promoter would be held liable [32]. The Canada Business Corporation Act amended five years later in 1975 improved on the provisions of section 20 of the OBCA by including

the possibility of company promoters to opt out of liability through express agreement [33].

However, for the purpose of shifting liability for a pre-incorporation contract away from company promoters under some specific circumstances, section 96 of the CAMA 2020 does not reflect the Canadian statutory provisions now contained in section 14 of the Canada Business Corporation Act 2001. There is no circumstance under which liability may shift away from the company promoters, or between the promoter and the company even after the company is incorporated. The promoter cannot even apply to the court for an order with respect to the nature and extent of the promoter's liability under the contract as it relates to the company [34]. The court is also not empowered to order that a promoter be relieved of liability, or to apportion liability between the promoter and the company in circumstances where it would be unconscionable for the promoter to solely bear liability.

Under the provisions of section 96 of the CAMA 2020 ratification is left entirely at the discretion of the company after incorporation, while liability for the contract permanently attaches to the promoter until the company exercises its discretion to ratify the contract. It needs to be noted that since the beginning of statutory intervention in common law rule on pre-incorporation contracts, the major objective has been to allow the shifting of liability away from the promoters to the company after incorporation and in appropriate circumstances. For instance, it may be necessary for liability for pre-incorporation contract to shift away from the promoters to the company after incorporation and the benefit of the contract fully accrued to the company. A company promoter may also deserve to be relieved of liability and the incorporated company fixed with such liability where the majority shareholders of the company blatantly fail or refuse to authorise the ratification of a pre-incorporation contract after the company has reaped the fruits of the contract.

In leading common law jurisdictions such as Australia and Canada, statutory provisions require that whether or not a pre-incorporation contract is ratified by the company upon incorporation, a party to the contract may apply to a court for an order concerning the nature and extent of the obligations and liability under the contract. And upon such application the court may make any order it deems fit towards apportioning liability between the party and the beneficiary of the contract [35]. A court can also order for damages to be paid to a company promoter who incurred liability under a pre-incorporation contract that has not been ratified by the company after incorporation [36]. Thus, where the company, upon incorporation, fails or refuses to ratify a pre-incorporation contract the promoter who incurs liability under the contract may bring a claim against the company for any benefit the company has received, or is entitled to receive under the terms of the contract.

The effect of these statutory provisions is that liability for pre-incorporation contracts does not permanently attach to the company promoter until the company ratifies the contract after incorporation. Unlike the provisions of section 96 of the CAMA 2020, in those common law jurisdictions liability for pre-incorporation contracts may shift, pursuant to a court order, from the promoter to the company even where there is no ratification by the company. In appropriate circumstances a court is statutorily empowered to intervene and determine who bears liability for such contract between the promoter and the company. In some other jurisdictions, liability may automatically shift from the promoter to the company after incorporation and the expiration of a statutorily stipulated period within which the company must either ratify or reject the pre-incorporation contract. At the expiration of the stipulated period the company is deemed to have ratified the contract and is therefore fixed with liability under the contract [37].

This model of statutory provisions is instructive in that it does not allow the company to withhold ratification for indeterminate period while liability sticks to the promoter. Therefore, liability for the pre-incorporation contract is able to shift to the company within a reasonable time after incorporation, and before the company may possibly become incapable to assume liability. In common law jurisdictions that statutorily provide for liability to shift away from the promoter to the company, the boundaries of liability for pre-incorporation contracts are fluid and elastic; liability may crystallise in the company upon incorporation and ratification of the contract, or may be extended to the company after incorporation and even without ratifying the contract. The objective is to ensure a just, fair and equal protection for all parties to a pre-incorporation contract. The company is protected as it has the opportunity, upon incorporation, to determine whether or not to ratify a pre-incorporation contract.

The promoter is protected as there is no permanent personal liability of the promoter under the common law principle in *Kelner v Baxter* since the company is allowed to ratify the contract after incorporation. Also, the court can intervene upon application by the promoter to order the company to accept liability where the company fails or refuses to ratify the contract after taking benefits under it. Generally, in circumstances where it would be unfair and unconscionable to allow liability to remain with the promoter the court can make an order for liability to shift to the company, or award appropriate damages to compensate the promoter. And in the shifting of liability, third parties to pre-incorporation contracts are adequately protected as the contract remains enforceable at all times either against the promoter or the company. The contract does not fail due to unenforceability that may arise from the avoidance of liability by both the promoter and the company as it was under the common law rule in the case of *Newborne v Sensolid (Great Britain) Ltd*.

These are in sharp contrast to the provisions of section 96 of the CAMA 2020 where the boundary of liability effectively encircles the company promoters and may be expanded to include the company only when the company chooses to ratify the contract at its sole discretion. Therefore, a significant limitation of the provisions of section 96 of the CAMA 2020 is that the boundary of liability is unfairly and unjustly constructed around the company promoters. Generally, under the section company promoters are personally liable for pre-incorporation contracts to an extent that reflects the common law position which the provisions of the section were meant to reform. Liability does not shift away from the promoter to the company except when the company decides to ratify the pre-incorporation contract. And there is no remedy provided under the section by which the promoter can compel, in deserving circumstances, a shift of liability to the company.

Although, section 96 of the CAMA 2020 provides that a company promoter may expressly contract out of liability, statutes in jurisdictions that allow the shifting of liability

also contain similar provisions [38]. Equal protection of all parties to a pre-incorporation contract through statutory provisions for the shifting of liability under the contract finds practical expression where the promoter enters the contract in the name or on behalf of a company that is yet to be incorporated. In spite of the provision, it is arguable whether third parties may enter pre-incorporation contracts where there is no available counter-party to be bound under the contract at the material time the contract is concluded. At best it would amount to a unilateral contract and therefore loses the essential features of a pre-incorporation contract which envisages the promoter contracting with a third party as an agent of a principal that is not yet in existence. Thus, the defining feature of a pre-incorporation contract is that the contract has to be binding on the company promoter at the time it is made but with the expectation that liability would shift to the company after incorporation.

Consequently, the provision of section 96 of the CAMA 2020 enabling company promoters to avoid liability under a pre-incorporation contract by express agreement does not make up for the failure to ensure that liability shifts appropriately from the promoter to the company after incorporation. Shifting of liability in deserving circumstances underpins the business essence and the legal objective of pre-incorporation contracts; the promoter is able to set up the business undertaking of the company while legally binding the company before it is incorporated. But most significantly, shifting of liability ensures that all parties to a pre-incorporation contract are equally protected. Accordingly, section 96 of the CAMA 2020 would need to be amended in order to allow the shifting of liability from the promoters to the company upon incorporation, thereby ensuring equal protection for all parties concerned.

Conclusion

It is surprising that section 96 of the CAMA 2020 are mere replications of the provisions of section 72 of the repealed Companies Act 1990! After two decades before the enactment of section 96, it would have been expected that the provisions accord fully with 21st century reform of the common law position on liability for pre-incorporation contracts. With Nigeria's notorious slothfulness towards reforming and updating its statutes, it can only be hoped that the opportunity to amend the provisions of section 96 of the CAMA 2020 would present itself sooner than later. If the opportunity does present itself, it is hereby recommended that the section is amended to go the whole hog in adapting the full ambit of the original Canadian provisions now contained in section 14 of the Canada Business Corporation Act 2001 (the CBCA) from which section 96 of the CAMA 2020 apparently derived. In particular, section 14(3) of the CBCA provides that;

Subject to subsection (4) [39], whether or not a 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 respecting the nature and extent of the obligations and liability under the contract of the corporation and the person who entered into, or purported to enter into, the contract in the name of or on behalf of the corporation. On the application the court may make any order it thinks fit.

The above provision of the CBCA is essential towards ensuring the protection of honest company promoters who would be compelled to carry the liability under a pre-incorporation contract that the company fails or refuses to ratify after incorporation and receipt of benefits from the contract. As stated earlier, upon incorporation a company may flagrantly refuse to ratify the contract and accept liability where the majority shareholders selfishly decline to authorise ratification. Under the provision, company promoters may apply to a court to intervene in shifting liability to the company in appropriate circumstances. The court may shift liability under the contract to the company by making an order requiring the company to pay all or part of the damages that the promoter is liable to pay, or transfer property that the company received from the contract to the promoter or a third party, as the case may be [40].

Also, it is necessary that future amendment of section 96 of the CAMA 2020 clearly stipulates the form of pre-incorporation contracts. The current provision for *any contract or other transaction* [41] implies both oral and written pre-incorporation contracts. It is hereby recommended that provision is made only for written pre-incorporation contracts as such contracts can fully disclose the obligations and liability of the respective parties to the contract. Full disclosure of the terms and conditions of a pre-incorporation contract is necessary for the protection of the company, and it complies with company promoters' fiduciary duty of full disclosure to the company provided in section 86 of the CAMA 2020. If section 96 of the CAMA 2020 is eventually amended to include these recommendations the boundaries of liability for pre-incorporation contracts would be properly delimited. This would ensure appropriate shifting of liability from the promoters to the incorporated company, thereby fostering equal protection for all parties to a pre-incorporation contract in Nigeria.

References

1. According to section 42 of the Nigerian Companies and Allied Matters Act 2020, from the date of incorporation mentioned in the certificate of incorporation, the company becomes a body corporate capable of exercising all the powers and performing all functions of an incorporated company including the power to hold land, and having perpetual succession. See also the foundational English case of *Salomon v Salomon & Co*. [1897] AC 22
2. Bowstead and Reynolds on Agency (16th Ed, 1996) para 1-001; See also Andrew Griffiths, 'Agents without principals: pre-incorporation contracts and section 36C of the Companies Act', 13(2) *Legal Studies*, 1985, 241-253
3. See the English case *of Dunlop Pneumatic Tyre Co Ltd v Selfridge Ltd*, 1915. AC 847
4. (1866-67) L.R. 2 C.P. 174
5. [1954] 1 Q.B. 45
6. See section 51 of the United Kingdom Companies Act 2006; Sections 131-133 of the Australian Corporation Act 2001; Sections 14 and 21 of the Canada Business Corporations Act; Section 35(1) of Malaysia Companies Act 1965 (as amended) and; Section 21 of the South African Companies Act No 71, 2008.
7. This definition of a company promoter as given by Cockburn CJ, in *Twycross v Grant* 2 C.P.D. 469 (1877) is adopted and amplified in section 85 of the CAMA 2020 which provides that; ''Any person who

undertakes to take part in forming a company with reference to a given project and 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, is 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 be deemed to be a promoter, 1877.

8. See the definition of a promoter in section 85 of the CAMA, ibid, 2020.
9. Andrew Griffiths. 'Agents without principals: pre-incorporation contracts and section 36C of the Companies Act' note 2 above, 1985.
10. See G Shapira. 'Directors without a Company and other Professing Agents', 5 *Ota Law Review*, 1975, 310-319.
11. (1866-67) L.R. 2 C.P. 174
12. Ibid, at 183
13. 117 C.L. R. 52. This was an Australian case decided by an English common law judge in a commonwealth jurisdiction, 1966.
14. Poonam Puri. 'The Promise of Certainty in the Law of Pre-Incorporation Contracts' 80 *The Canadian Bar Review*, 2001, 1051-1064
15. Poonam Puri. The Promise of Certainty in the Law of Pre-Incorporation Contracts, ibid, citing RWV Dickerson, J.L. Howard & L. Detz, (1971). Proposals for a New Business Corporations Law for Canada (Ottawa: Information Canada, 1971) at 22, para. 69
16. [1954] 1 Q.B. 45
17. Jacqueline Obule. Company Law: A Critical Analysis of *Kelner v Baxter*, 2016. 10.13140/RG.2.1.4286.1042
18. [1982] Q.B. 938; [1981] 3 W.L.R. 736
19. When the United Kingdom became a Member State of the EEC, effect was given to Article 7 of the First Council Directive (68/151/EEC). Section 9(2) of the European Communities Act 1972 (ECA 1972) provides that; "if, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefore unless otherwise agreed". See Markesinis, B. (1976). The Law of Agency and Section 9 (2) of the European Communities Act 1972 *Cambridge Law Journal* 35(1), 112-134. Retrieved June 23, 2021, from http://www.jstor.org/stable/4505900
20. See section 36C of the UK Companies Act 1985 which provided for promoters' general liability unless there was an agreement to the contrary. The provision is now contained in section 51 of the extant Companies Act, 2006.
21. See section 51 of the UK Companies Act which provides; ''A contract that purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly''.
22. (1888) 38 Ch D 156
23. See *Natal Land and Colonisation Co Ltd v Pauline Colliery and Development Syndicate Ltd* AC 120, 1904.
24. Statutory provision on liability for pre-incorporation contracts in Nigeria appeared for the first time in section 72 of the erstwhile Companies and allied Matters Act 1990. It is the provisions of the section that are reproduced verbatim in section 96 of the extant Companies and Allied Matters Act, 2020.
25. (1961) 1 All N.L.R. 555
26. Per Honourable Justice Sowemimo, at p. 556
27. (1971) 1 NCLR 180
28. (1984) N.S.C.C. 553
29. (1986) 17 NSCC 1084
30. Although, in *Edokpolo v Sem-Edo Wire Industries Ltd* the Nigerian Supreme Court held that a company may ratify a pre-incorporation contract without a novation. According to Nnamani, JSC, '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 company after incorporation as well as from the minutes of its general meetings and board meetings'. It is submitted that ratification of a pre-incorporation need not be consented to by the third party. What is important is that after incorporation the company steps in to relieve the promoter of liability for the contract.
31. See section 86(1) of the CAMA, 2020.
32. The reform of the common law position on liability for pre-incorporation started in Canada in the 1960s under the Lawrence Committee on Company Law which drafted the amendment to the Ontario Business Corporation Act 1970. The amendment was adopted and recommended by the Dickerson Committee to be included in the 1975 amendments to the Canada Business Corporation Act 1975. See AJ Easson & DA Soberman, (1992). "Pre-Incorporation Contracts: Common Law Confusion and Statutory Complexity" (1992) 17 Queens Law Journal 414:415
33. The provisions are now contained in section 14(1) and (2) of the Canada Business Corporation Act, 2001.
34. See section 14(3) of the Canada Business Corporation Act 2001 which provides that 'whether or not a 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 respecting the nature and extent of the obligations and liability under the contract of the corporation and the person who entered into, or purported to enter into, the contract in the name of or on behalf of the corporation. On the application the court may make any order it thinks fit'.
35. See section 14(3) of the Canada Business Corporation Act, 2001.
36. See section 131 of the Australia Corporation Act, 2001.
37. See section 21(5) of the South African Companies Act No. 71 of 2008 which provides that; '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. Subsection (1) is to the effect that; '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'.

38. See section 14(3) of the Canada Business Corporation Act 2001 and section 131 of the Australia Corporation Act, 2001.
39. Section 14(4) provides that company promoters may avoid liability under an express agreement to that effect; 'If expressly so provided in the written contract, 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''.
40. See section 131(3) of the Australia Corporation Act, 2001.
41. See the opening line of section 96 of the CAMA; italic is author's, 2020.