

**SUPREME COURT OF NIGERIA**  
4TH APRIL, 1997. SC. 126/1994  
**CORAM:- A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE,**  
**U. MOHAMMED, A. I. IGUH, JJSC.**

SOCIETE GENERALE FAVOURISER .....	DEFENDANT/
LE DEVELOPMENT DU COMMERCE	APPELLANT
ET DE L'INDUSTRIE EN FRANCE	
AND	
SOCIETE GENERALE BANK (NIG.) LTD .....	PLAINTIFF/
	RESPONDENT

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**ACTIONS** - *Case of appellant in the High Court - Is on the issue of ratification of the 1976 agreement.*

**COMPANY LAW** - *Pre-incorporation agreement - Where plaintiff has already built its case on this premise - Whether it can now contest that the agreement in issue - Is no longer a pre-incorporation contract.*

**COMPANY LAW** - *Agents of a disclosed principal - promoters can enter into a pre-incorporation contract - As agents of the disclosed company that is not yet in existence.*

**COMPANY LAW** - *Pre-incorporation contract - Common law position is different from our statutory position - Under s. 72(1) of CAMA ratification is allowed.*

**COMPANY LAW** - *Arbitration clause - Contained in a pre-incorporation contract that was subsequently ratified - Is binding on the respondent.*

**STATUTES** - *Companies & Allied Matters Act s. 72(1) - Ratification of pre-incorporation contract under the Act - Applies to contracts already ratified by existing companies - And those yet to be ratified.*

**FACTS**

In 1976 Dr. Saraki and 2 others agreed to form a bank in Nigeria with the defendant/appellant. The bank so agreed to be formed is the plaintiff/respondent. The three gentlemen executed a written agreement on 7-7-76 with the appellant which provided inter alia, that any dispute between the parties shall be referred to the arbitration and final decision of a person to be agreed

between the parties. The respondent bank was subsequently incorporated under the Company's Act 1968. At a meeting of the Board of Directors of the respondent, the agreement of 7-7-76 was ratified. The appellant acted as managers to the new respondent bank.

It would seem that the relationship of the parties soured. Respondent terminated the management arrangement and instituted an action against the appellant claiming inter alia, the sum of N163,347,309.52k being the amount it lost as a result of mismanagement/negligence of the appellant. The appellant relying on the arbitration clause of the parties' agreement prayed that the proceedings be stayed. The trial court upheld the prayer and stayed further proceedings in the action. Respondent's appeal to the Court of appeal was allowed. Appellant has now appealed to the Supreme Court raising 3 issues which the final Court narrowed down to a single issue. Respondent cross appealed on an issue.

#### **ISSUE FOR DETERMINATION**

*Whether by the combined effect of sections 72, 624 and 626 of the Companies and Allied Matters Act (hereinafter referred to simply as CAMA) the 1976 agreement is binding on the Respondent, the latter having ratified same after its incorporation in 1977.*

**HELD** (Unanimously allowing the appeal and dismissing the cross per lead judgment of **OGUNDARE JSC**)

#### **Where plaintiff has already built its case on pre-incorporation agreement**

1. The two courts below both considered the agreement as such and based their respective judgments on that basis. The Cross-Appellant now seeks in its cross-appeal to contend that the agreement, in law, is not a pre-incorporation agreement. I do not think it is open to the cross-appellant to put up such a case in this Court. I must hold that it is not open to the Respondent after building up his case in the two courts below on the premise that the 1976 agreement was a pre-incorporation contract to now turn round in this Court and put up a case that that agreement is not a pre-incorporation agreement. For this reason alone, the cross-appeal ought to fail. I hereby dismiss it. (p. 638 H)

#### **Case of appellant in the High Court**

2. In the light of the above I do not think it is right to say that ratification of 1976 agreement was not the case of the Appellant in the High Court. (P. 645 A)

#### **Agents of a disclosed principal**

3. The main purpose of the agreement was to provide for technical manage-

ment for the new Bank. Dr. Saraki, Dr. Ikomi and Mr. Kotoye obviously acted for and on behalf of the Respondent in executing that agreement which, in essence, was one between the respondent and the Appellant as the technical managers. They ostensibly were agents of a disclosed principal even though the latter was not yet in existence at the time. And that is why the agreement is referred to as a "pre-incorporation agreement". (p. 645 E)

### **Common law position on pre-incorporation contract**

4. At common law a company before its incorporation has no capacity to contract. Consequently, nobody can contract for it as agent nor can a pre-incorporation contract be ratified by the company after its incorporation. The company can, however, after its incorporation, enter into a new contract to put into effect the terms of the pre-incorporation contract. All that has now changed in this country for section 72(1) of CAMA makes it possible for a pre-incorporation contract to be ratified by a company after its incorporation and thereby becoming bound by it and entitled to the benefit thereof. (pp. 645 G & 646 C)

### **Companies & Allied Matters Act s. 72(1)**

5. Since Section 624(1)(b) applies Section 72(1) to all companies existing at the time CAMA came into force and the Respondent was one of such existing companies, and since it is a matter of general practice that companies, immediately after their incorporation, ratify contracts made on their behalf before incorporation, the law must intend that section 72(1) would apply to pre-incorporation contracts already ratified by existing companies as well as to such contracts yet to be ratified. In my respectful view this is the only logical and reasonable construction to be placed on section 72(1) when read along with section 624(1)(b). If it were to be otherwise, the law maker would have provided that in the case of existing companies section 72(1) would only apply to pre-incorporation contracts that may subsequently be ratified. (p. 648 G)

### **Arbitration clause**

6. With the conclusion I have just reached that section 72(1) read along with section 624(1)(b) applies to the Respondent, I must hold that the Court below was in error to hold as it did. I must equally hold that as the 1976 agreement was ratified by the Respondent after its incorporation and as the agreement is validated by section 72(1) of CAMA the Respondent is bound by the arbitration clause in that agreement and the learned trial Judge was right, therefore, in ordering a stay of proceedings of Respondent's action pending the outcome of arbitration between them. (p. 649 C)

**NOTABLE POINTS OF INTEREST**

**OGUNDARE JSC**

*1. Issue of the law not being in force at commencement of action*

If, therefore, section 72(1) applies to the Respondent it is of no moment that the law was not in force when the action was brought. The application to stay  
B proceedings is a matter of procedural law not substantive law and I can see nothing to prevent the Appellant invoking CAMA in support of the validity of the 1976 agreement. (p. 648 D)

*2. Construction of a statute is the issue not retrospectivity*

C The issue here has nothing to do with retrospectivity of a statute but with the construction to be placed on its provisions. I do not think section 651(2) of CAMA helps the Respondent either. On the contrary, if anything, it makes the ratification by the Respondent of the 1976 Agreement to have effect as if it was given under the Act (CAMA). (p. 649 A)

D

**REPRESENTATION**

H. O. Ajumogobia with Mrs. R. Babajide for the Appellant

B. Aluko for the Respondent/Cross - Appellant.

**E CASES REFERRED TO**

Ogunade v. Ogunade (1965) NMLR 136

Trans Bridge Co. Ltd. v. Survey International Co. Ltd. (1986) 17 NSCC 1084

Enahoro v. B.W.A. Ltd. (1971) 1 NCLR 180

Kelner v. Baxter (1867) LR 2 CP 174

F Howard v. Patent Ivory Manufacturing Co. (1888)

Natal Land etc Co. Ltd. v. Pauline Colliery Syndicate Ltd (1904) A.C. 120

**STATUTE REFERRED TO**

Companies & Allied Matters Act (CAMA) 1990 ss. 72, 624, 626, 651 (2)

G

**LEAD JUDGMENT BY OGUNDARE JSC**

Sometime in 1976 Dr. Abubakar Sole Saraki, Dr. E.A. Ikomi, Mr. N.A.B. Kotoye and societe General Favouriser Le Developement du Commerce et de L'industrie en France (who is the Appellant in the appeal now before us and  
H shall hereinafter be referred to as the Appellant) agreed to form a bank in Nigeria to be known as Societe Generale Bank (Nigeria) Limited. On 7th July 1976 the three gentlemen and the Appellant executed a written agreement wherein the parties are referred to as "founders" of the bank to be incorporated. The agreement contains a number of articles, one of which, Article II

provides:

*"If any difference or dispute shall arise between the Parties as to the construction of the Agreement or as to any matter or thing of whatsoever nature arising thereunder, or in connection thereunder, or in connection therewith, such dispute or difference, shall be referred to the Arbitration and final decision of a person to be agreed between the Parties or failing B Agreement within 14 days (fourteen) after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either Party by the President of the international Chambers of Commerce in Paris according to its rule."*

The bank was incorporated, under the Companies Act 1968, in December C 1976. At a meeting of the board of Directors of the new bank, id est, Societe Generale Bank (Nigeria) Ltd. (hereinafter referred to as the Respondent) the agreement of the 7th July 1976 was ratified. The Appellant acted as Managers to the new bank.

It would appear that the relationship between the Appellant and the D Respondent soured in consequence of which the latter terminated the management arrangement and instituted an action in 1989 at the High Court of Lagos State, against the Appellant claiming as per paragraph 27 of its Statement of Claim as hereunder:

*"WHEREOF the Plaintiff claims as follows:*

A. (i) N163,347,309.52k, being amount lost by the Plaintiff as a result of mismanagement/negligence by the Defendant of the credit facilities granted by the Plaintiff on the advice of the Defendant - see paragraphs 10 to 13 of Claim.

(ii) N10 million, being lost of interest on the amount deposited F with Central Bank of Nigeria free of interest - see paragraph 15 of Claim.

(iii) N1 million, being amount paid as penalties and fines for contravention of Central Bank of Nigeria's guidelines and provisions of the Banking Act - see paragraph 13 of Claim.

(iv) FF 20, 750,000 or its Naira equivalent, being amount taken G out of the Plaintiff's account by the Defendant without authority - see paragraph 16 of Claim.

(v) N16,883,000.00, being the amount received by the Defendant from Silos, a subsidiary of doumeng Group which amount was not reflected in the Plaintiff's books.

(vi) interest on the amounts claimed in A(i) to A(v) hereof at the rate of 18% from the date of Writ until payment.

B. An order directing the Defendant to disclose the account numbers of the various accounts kept by the Defendant overseas in the name of H

*the Plaintiff and/or on its behalf.*

*C. An account of monies kept by the Defendant in the Plaintiff's name in the Defendant's Branches in London, Paris and other places in Europe and elsewhere."*

On being served with the Writ, the Appellant brought a summons at B the trial court, praying for an order that:

*"all further proceedings in this action be stayed under the Inherent Jurisdiction of the Court and/or under Section 5 of the Arbitration Law, Cap. 10 volume 1 of the Laws of Lagos State."*

The summons contained the grounds for the application and was supported C by an affidavit to which was annexed the agreement of 7th July, 1976. There was a further affidavit to which was annexed the minutes of the meeting of the board of directors of the Respondent held at the Federal Palace Hotel, Victoria Island Lagos on 8th March, 1977 at which said meeting the agreement of 7th July 1976 was ratified. There were other documents attached to the said D further affidavit.

The summons came before the High court of Lagos State on 25th January, 1990 for hearing and the learned trial Judge (Adeniji J.) after hearing arguments from learned counsel for the parties, in a ruling delivered by him on 24th April 1990, granted the application and stayed further proceedings in the E action.

The Respondent was dissatisfied with the ruling and appealed to the Court of Appeal which Court allowed the appeal. The Appellant has now appealed to this Court against the decision of the Court of Appeal. The Respondent too cross-appealed against that part of the decision of the Court F of Appeal wherein that Court adjudged the agreement of 7th July 1976 to be a "pre-incorporation contract". Parties filed and exchanged their respective Briefs of Argument in respect of the two appeals. In the Appellant's Brief the issues for determination in the main appeal are formulated as follows:

*"WHERE s.6 of the Interpretation Act (Cap. 192) is not over-ridden by the G express provisions of s. 624 and s. 626 of CAMA so as to make s. 72 of CAMA have retrospective application.*

*WHETHER by the ordinary, plain and natural meaning of s. 624 and s. 626 of CAMA, s. 72 in PART A OF CAMA does not make the ratification of the Agreement binding on the Respondent despite the respondent's formation H and registration prior to the commencement of CAMA.*

*WHETHER s. 72 of CAMA does not apply to the Respondent Company so as to make the Agreement binding on the respondent, notwithstanding that the Respondent's action which was filed in December 1989 was pending when CAMA first came into effect on January 2, 1990."*

The Respondent states the issues as follows:

QUESTION NUMBER ONE (1)

*Whether the Supreme Court ought to decline jurisdiction to examine the effect, if any, of sections 72, 624, and 626 of the Companies And Allied Matters Act: [Cap. 59, Laws of The Federation of Nigeria, 1990] on the 7th July 1976 'Technical Management Agreement' that forms the 'crux' - issue in contention in the Appellant's appeal on the grounds that contrary to the erroneous assumption which the court below made, the subject - "Agreement" is not a 'pre-incorporation contract' [within the true and proper judicial meaning of the term] of the kind to which those sections of the Act could possibly apply: [whether retrospectively, or prospectively, or at all].*

QUESTION NUMBER TWO (2)

*Whether upon the true and proper legal construction of the 'natural, ordinary and plain meaning' of the words used in sections 72, 624, 626, and 651 of the Companies and allied Matters Act, which did not come into force until 2nd January 1990, vis-a-vis section 6 of the Interpretation Act, it is the express and unambiguous intention of the Legislature that the Companies And Allied Matters Act may apply retrospectively to bind the Respondent to the terms of an 'Arbitration clause' in a 1976 agreement by its 1977 act of purported 'ratification' of the same, notwithstanding the 'presumption against retrospectivity' and the 'accrued rights' acquired by the Respondent in spend 'legal proceedings' by virtue of the law as it stood at the time the Respondent's 'cause of action' arose/was enforced in December 1989 before the Companies And Allied Matters Act went into force and effect."*

Undoubtedly, the Respondent's Question 1 above is in respect of its cross-appeal. The Appellant in its reply Brief raised objection to the cross appeal on the ground that this Court cannot entertain the point raised by the Respondent for the reason that:

*(a) the stand of the Respondent in the two lower courts was that the agreement of 7th July 1976 was a pre-incorporation contract and the issue in those courts had been entirely contested on this premise; and*

*(b) the issue now being raised on the cross-appeal being a new issue of law could not be raised as it was never tried by the trial court.*

The Appellant in its Reply Brief also replied in the alternative, to arguments raised on the cross-appeal.

It is apt that I first deal with the cross-appeal for if it succeeds, the main appeal must, of necessity, fail. In doing so the objection raised by the appellant to that appeal will first be considered.

CROSS-APPEAL

In the cross-appeal, the Respondent, as cross-appellant, contends

that the agreement of the 7th July, 1979 (hereinafter referred to as the 1976 agreement) is not a pre-incorporation agreement and that for that reason the Court of Appeal, that is, the Court below, as well as the trial High Court, erred in treating that agreement as a pre-incorporation contract. The Appellant, who is respondent to the cross-appeal, submits by way of preliminary objection to the cross-appeal that the Respondent/Cross-Appellant cannot be permitted to entirely repudiate the position it adopted and maintained before the lower courts. It is the appellant/Cross-Respondent's contention that the cross-appellant's position in the two courts below was that the 1976 agreement was a pre-incorporation contract.

C I think the objection is well taken. At the trial High Court the position taken by the Cross-Appellant was that the 1976 agreement was a pre-incorporation agreement. Prof. Kasunmu, SAN, its learned leading counsel, in his submission before the trial High Court said:

*"In Exhibits A & B - the parties to the Agreement are Defendants on one hand and 3 Nigerian Promoters of Plaintiff's Company - 7/7/76. They are bound by that Agreement. As at that time, Plaintiff's Company was not yet incorporated.*

*So Exhibits A & B are pre-incorporation Agreement prior to the Incorporation of the Plaintiff's Company. There are provision for ratification of the pre-incorporation Agreement.*

*Exhibit C - Minutes of Board's Meeting of 9/5/77 - ratified, Exhibits A & B. It was signed for authentication only. The Question that follows is this: Is the Plaintiff Company bound by Exhibit A & B merely because it was ratified by it at its 1st Board Meeting. Submits that five authorities both in U.K. and Nigeria show quite Clearly that a Company is not bound by a pre-incorporation Agreement entered into by promoters before its Incorporation even if the pre-incorporation Contract is ratified or adopted by the Company, at the Meeting in Exh. C."*

Again in the appeal to the Court of appeal Professor Kasunmu in the Appellant's Brief (the Cross-Appellant was the appellant in the court below) again observed:

*"It is pertinent to observe that the Technical Management Agreement now tendered as additional evidence was not a new agreement between the Plaintiff and the Defendant but was the same pre-incorporation agreement annexed to the Affidavit in support of the Defendant's application."*

**The two courts below both considered the agreement as such and based their respective judgment on that basis. The Cross-Appellant now seeks in its cross-appeal to contend that the agreement, in law, is not a pre-incorporation**

**agreement. I do not think it is open to the cross-appellant to put up such a case in this Court.**

In Ogunade & Ors. v. Ogunade (1965) NMLR 136, this Court had cause to consider a similar situation. In that case the Appellants had argued before the Registrar of Titles that they were successors to one Musa who was donee of a gift of the property in dispute from the owner James Ademosu B Ogunade. This was the basis of their objection to the respondent's application for first registration of an intestate estate. They lost before the Registrar of Titles and in the Lagos High Court. On appeal to this Court, the Appellants then argued that the conveyance under which the respondent relied for application for a first registration was void for want of registration under section 14 C of the Land Registration Act (Cap 99) Laws of Nigeria. They further argued that their interest was protected (a) by the Enfranchisement of the property under the Epetedo Lands Act (Cap 61) and (b) by their long occupation; and that the Registrar of Titles was wrong in effecting amendments to the proceedings before him. It was held by this Court that it was not open to the D appellants, after putting up a case before the Registrar of Titles as successors of Musa, a donee of a gift from the owner James Ademosu Ogunade, to put up on appeal, a totally different case that the said owner was never the owner for want of registration. G. B. A. Coker JSC delivering the judgment of this Court at page 138 of the report observed:

*"Here, the objectors traced their title to this buyer, who, they alleged, had made a gift of his property to their father Musa. Both parties put in Exhibit B as evidence of how James Ademosun Ogunada come to be the owner. Respondent's learned counsel referred to sec.9(1) of the Registration of Titles Act, which provides that -*

*'9(1). In investigating a title with a view to first registration, the Registrar may accept and act on less than legal evidence or less than the evidence ordinarily required by conveyancers if he is satisfied of the truth of the facts to be proved, and may act on evidence of the same facts adduced before him in other proceedings.'*

*His argument was that the Registrar of Titles could have regard to Exhibit B as evidence in the case. In his reply learned counsel for the appellants did not deal with that argument; presumably he conceded the point.*

*We do not propose to deal with it: for in our view it was not open to the appellants, after putting up a case before the Registrar of Titles as successors of Musa, the donee of a gift from the owner James Ademosun Ogunade, to put up on appeal, a totally different case, namely as we gather from ground 1 of the appeal, that James ademosun Ogunade was never the owner because Exhibit B was void for want of registration. This is a complete change*

*of front which cannot be countenanced, and Ground 1 must fail."*

Applying the principle in that case to the case now before us **I must hold that it is not open to the Respondent after building up his case in the two courts below on the premise that the 1976 agreement was a pre-incorporation contract to now turn round in this Court and put up a case that that agreement is not a pre-incorporation agreement. For this reason alone, the cross-appeal ought to fail. I hereby dismiss it.**

MAIN APPEAL:

In my respectful view the main issue for determination in the main appeal is whether by the combined effect of sections 72, 624 and 626 of the Companies and Allied Matters Act<sup>2</sup> (hereinafter referred to simply as CAMA) the 1976 agreement is binding on the Respondent, the latter having ratified same after its incorporation in 1977. The Appellant contends that, while at common law, a company cannot validly ratify a pre-incorporation contract, but by the combined effect of sections 72, 624 and 626 of CAMA, the 1976 agreement having been ratified by the Respondent in 1977, is binding on the parties. The Respondent argues to the contrary. It contends that the CAMA has no retrospective application.

Mr. Ajumogobia learned leading counsel for the Appellant submits that section 6 of the Interpretation Act cannot override specific provisions of an enactment. He refers to section 72 of CAMA and observes that it does not, on its face, apply retrospectively. He submits that section 624(1)(b) of the Act, however, makes the provision of section 72 to apply not only to companies formed under the Act but to all existing companies as well, that is, to companies formed under previous legislations. He submits that section 72, therefore, applies to the Respondent. He observes that section 626 defines the manner by which section 72 applies to existing companies and argues that reading sections 624 and 626 together, section 72 applies to existing companies retrospectively. On whether the 1976 agreement was entered into on behalf of the Respondent, learned counsel submits that the fact that an agreement is not signed or executed expressly on behalf of another does not foreclose the argument that, indeed, it was signed on behalf of that other. He refers to Exhibit B, that is, the 1976 agreement and concedes that Respondent's name does not appear on it nor is it shown that the signatories signed on its behalf. He submits that the entire purport of Exhibit B is that the first 3 parties agreed with the 4th party (the Appellant) that the Appellant should manage the affairs of the Respondent which at the time of the agreement was not yet incorporated. He refers to Articles 4.05, 6.03, 7.03 and 8 of the agreement and

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<sup>2</sup>See pp. 641 G & 642 for the ss. referred to

submits that the first three parties signed on behalf of the Respondent. He says that Article 8 was fulfilled at the first meeting of the Board of the Respondent. He refers to the minutes of the meeting of the Board of Directors of the Respondent held at the Federal Palace Hotel, Victoria Island, Lagos on 8th March 1977 at which meeting the 1976 agreement was ratified by the Board. Learned counsel submits that the interpretation of the phrase "on behalf of" means "on the part of", "on account of", "in the interest of". Learned counsel observes that Articles 11 of Exhibit B provides for arbitration and urges the Court to hold that it is binding on the Respondent. B

Mr. Aluko learned counsel for the Respondent observes that Exhibit B was executed on 7th July 1976 and that the Respondent was incorporated on 16/12/76. He also observes that the first meeting of the Board of Directors of the Respondent was held on 8/3/77 and that the present proceedings commenced in the High Court of Lagos State on 4/12/89. He submits that the Respondent is not a party to Exhibit B nor was it signed on its behalf. He submits also that the document is a mere shareholders agreement between the 4 parties to it, including the Appellant. Learned counsel refers to section 72 and says that the crucial words therein are: "may be ratified by the Company". Learned counsel further says that it was not the case of the Appellant in the High Court that such a ratification took place in 1977. He submits that ratification of Exhibit B was not the case of the Appellant in the lower courts. He further submits that there is nothing in sections 72, 624 and 626 of CAMA that shows that it is intended that after 1990 a company could be bound by ratification which act of ratification occurred in 1977. He submits that the more logical construction to be placed on the sections is that where the act of ratification occurred after 1990 then the company could be held to its 1976 agreement. He says that this was not what happened in the instant case where the act for ratification was done in 1977. Learned counsel submits further that section 651(2) prohibits retrospectivity and preserves the common law and section 6 of the Interpretation Act position. He submits that under the common law the Respondent could not be bound. D E F G

Before proceeding to a consideration of the issue arising in this appeal I need to set out the provisions of the statutes relevant to this case.

COMPANIES AND ALLIED MATTERS ACT:

"72. (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." H

[illegible]

624. (1) Except as otherwise provided, this part, that is, PART A of this Act shall apply to -

(a) all companies formed and registered under this PART of this Act;

(b) all existing companies;

B (c) all companies incorporated, formed or registered under other enactments; and

(d) *unregistered companies.*"

[illegible]

626. *In the application of this Act to existing companies, it shall apply in the*

C same manner -

(a) in the case of a limited company other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares;

(b) in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and

(c) in the case of a company, other than a limited company, as if the company, had been formed and registered under this Act as an unlimited company:

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the Companies Act, 1912 as the first Nigerian enactment in respect of companies, or as the case may be, any enactment relating to companies thereafter in force in Nigeria before the commencement of this Act."

F 651. (2) *Nothing in this Act shall affect any order, rule, regulation, appointment, conveyance, mortgage, deed or agreement made, resolution passed, direction give, proceeding taken, instrument issued or thing done under the enactment hereby repealed; but any such order, rule, regulation, appointment, conveyance, mortgage, agreement, resolution, direction, proceeding,*  
G *instrument or thing if it force immediately before the commencement of this Act shall, on the commencement of this Act, continue in force, and, so far as it could have been made, passed, given, taken, issued or done under this Act, shall have effect as if so made, passed, given, taken, issued or done."*

Interpretation Act: Section 6.

H "6.(1) *The repeal of an enactment shall not -*

(a) *revive anything not in force or existing at the time when the repeal takes effect;*

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment;

(c) affect any right, privilege, obligation or liability accrued or incurred under the enactment;

(d) affect any penalty, forfeiture of punishment incurred in respect of any offence committed under the enactment;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed."

Mr. Aluko submits that ratification of the 1976 agreement was not the case of the Appellant in the High Court. With respect, this cannot be right. In the summons issued by the Appellant for order to stay proceedings, the grounds for the application were stated to be:

(1) The terms of the contract between the defendant and the plaintiff for the general management of the plaintiff bank are contained in a document dated 7th July 1976 made between Dr. Abubakar 'Sola Saraki, Dr. E. A. Ikomi and Mr. N. A. B. Kotoye and the defendant, they being parties of the 1st, 2nd, 3rd and 4th parts respectively and subsequently ratified by the plaintiff upon its incorporation and thereafter consistently applied by the parties herein.

(2) The Agreement defines 'the founders' as meaning the four parties to the Agreement and stipulates, inter alia, '..... Article 8 The Founders undertake to do the necessary in order that the first Meeting of the elected Board of Directors of the Bank does ratify their signing of the present Co-operation Agreement between the Founders and Societe Generale.

Article 9

This Agreement will remain in force for an initial period of 7 years as from the date of ratification as provided for Article 8 hereabove and will be reviewed automatically for a period of three years in the first instance and thereafter on a year by year basis unless cancelled by the Board Societe Generale giving the other party six months prior notice in writing of such cancellation.

Article 10

This Agreement shall be governed by, construed and interpreted in accordance with the General International Principles of Law applied to such matters.

Article 11

If any difference, or dispute shall arise between the Parties as to the con-

*struction of the Agreement or as to any matter, or thing of whatsoever nature arising thereunder, or in connection thereunder, or in connection thereunder, or in connection therewith, then such dispute or difference, shall be referred to the Arbitration and final decision of a person to be agreed between the Parties, or failing Agreement within 14 days (fourteen) after either party, has given to the other a written request to occur in the appointment of an Arbitrator, a person to be appointed on the request of either Party by the President of the International Chamber of Commerce in Paris according to its rules'*

(3) *The Agreement was duly ratified by the Board of Directors of the plaintiff bank as governing its general Management by the defendant bank.*

(4) *The provision of the Agreement regulate the general management of the plaintiff bank from its inception by the defendant bank.*

(5) *The defendant was at the time this action was commenced and still remains ready and willing to do all thing necessary to the proper conduct of the arbitration."*

*And in the affidavit in support, the following facts were deposed to:*

"(3) *That produced and now shown to me and marked 'Exhibit A' is a letter dated 7th July 1976 signed by Dr. Abubakar 'Sola Saraki, Mr. N. A. N. Kotoye and Dr. E. A. Ikomi, the last named person now being the Chairman of the plaintiff bank.*

(4) *That also now produced and shown to me and marked 'Exhibit B' is an agreement bearing the same date made between the said persons as of the 1st, 2nd and 3rd parts respectively and the defendant bank of the 4th part and executed by all the parties.*

(5) *That Exhibit B was ratified as required by clause 8 thereof and the plaintiff and the defendant have had all their dealings in respect of the matters therein provided for regulated by the terms thereof since the inception of the Bank.*

(6) *That the minutes of the meetings of the Board of Directors of the plaintiff Bank as well as correspondences emanating from the plaintiff bank amply confirm that the provision of Exhibit B set out the terms of the contract between the plaintiff and defendant relating to the technical aid and function of general management of the plaintiff bank since its inception.*

(7)(1) *That Article 11 of the Agreement contains a clause whereby all differences or disputes which may arise as to the construction of the Agreement or as to any matter or thing of whatsoever nature arising thereunder, or in connection therewith, shall be referred to Arbitration in the manner therein stated*

*(ii) That the plaintiff has not availed itself of the machinery therein*

*agreed for the determination of disputes between it and the defendants.*

(8) *That the defendant was at the time this action was filed and still is ready willing and able to do all things necessary to the proper conduct of the arbitration.*

**In the light of the above I do not think it is right to say that ratification of 1976 agreement was not the case of the Appellant in the High Court.**

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Another point that calls for determination at this stage is the submission of Mr. Aluko that the 1976 agreement was a mere shareholders agreement that was not signed on behalf of the Respondent. True enough, it is not stated on the face of the agreement (Exhibit B) that Dr. Abubakar 'Sola Saraki, Dr. E. A. Ikomi and Mr. N.A.B. Kotoye entered into the agreement on behalf of the Respondent. Reading the agreement as a whole, however, it is not in doubt that they did so on behalf of the new Bank - Societe Generale Bank (Nigeria) Ltd., - as at the time yet to be incorporated and on incorporation became the Respondent. I say this because of the provisions of the penultimate articles of the agreements, particularly paragraph 4.05 of Article 4 which reads:

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*"The cost of the salary and of travelling to and from Nigeria of such staff will be invoiced by Societe Generale at cost price to, and paid by, the Bank and in addition accommodation and living expenses of such staff will be borne by the Bank," and*

Articles 5-8, all of which require action by the Bank or the Board of the Bank. **The main purpose of the agreement was to provide for technical management for the new Bank. Dr. Saraki, Dr. Ikomi and Mr. Kotoye obviously acted for and on behalf of the Respondent in executing that agreement which, in essence, was one between the respondent and the Appellant as the technical managers. They ostensibly were agents of a disclosed principal even though the latter was not yet in existence at the time. And that is why the agreement is referred to as a "pre-incorporation agreement".**

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Having disposed of these minor issues raised in argument, I now turn to the main question in this appeal and, that is, whether the Respondent is bound by the 1976 agreement (Exhibit B). **At common law a company before its incorporation has no capacity to consequently, nobody can contract for it as agent nor can a pre-incorporation contract be ratified by the company after its incorporation - TransBridge Co. Ltd. v. Surrey International Co. Ltd. (1986) 17 NSCC 1084; Edokpolo & Co. Ltd. v. Sem-Edo Wire Industries Ltd. & Ors. (1984) 7SC 119; Sparks Electrics (Nig.) Ltd. vs. Ponnile (1986) 12 NWLR H 578;**

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Enahoro v. B.W.A. LTD. (1971) 1 NCLR 180; Kelner v. Baxter (1867) LR 2CP 174, Natal Land and Colonization Co. v. Pauline Syndicate (1904) AC. 120. The rationale for this rule was stated at page 183 of the report by Erle CJ in Kelner

v. Baxter in these words:

"..... as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out proposition that, where a contract is signed by one who professes to be signing 'as agent', but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before."

**The company can, however, after its incorporation, enter into a new contract to put into effect the terms of the pre-incorporation contract - Touche v. Metropolitan Railway Warehousing Co. (1871) 6 Ch App 671, Howard v. Patent Ivory Manufacturing Co. (1888) 38 CH. D 156.**

**All that has now changed in this country for section 72(1) of CAMA makes it possible for a pre-incorporation contract to be ratified by a company after its incorporation and thereby becoming bound by it and entitled to the benefit thereof.** There seems to be no dispute in this appeal about this conclusion.

What is in dispute is as to whether the Respondent which was incorporated in December 1976 would be bound by the 1976 pre-incorporation agreement entered into on its behalf by the 1st to the 3rd parties to that agreement and which was ratified by it in 1977. It is the contention of the Appellant, both in this Court and in the court below, that by the combined effect of Sections 72(!), 624(1)(b) and 626(a) of CAMA the Respondent is bound. The Respondent contends to the contrary. It is its argument that as the ratification took place before 1990 when CAMA came into force section 72(1) would not apply to save the 1976 agreement. It would have been otherwise, it further argues, if there had been a new ratification after the coming into force of CAMA in 1990. The Respondent further points out that this action had already been filed in 1989 when CAMA came into force. The Court below did not find in favour of the Appellant's contention. In the lead judgment of Sulu-Gambari JCA with which the other justices agreed the Court observed:

"When asked by this Court to cite any authority for submitting that the combined effect of Sections 72, 624 and 626 of the Companies and Allied Matters Act is that the Appellant Company shall be governed by Section 72 of the Act, learned counsel for the Respondent informed the court that he was not aware of any authority on the point.

*Indeed, all these submissions of the learned counsel for the respondent on the retrospective operation of Section 72 or the effect of the combination of Section 72, 624 and 626 of the Act to the circumstances of this case on appeal are devoid of any cogent argument and legal authority. No attempt has been positively made by the learned counsel for the respondent to apply any of the canons of the interpretation to support his interpretation."* B

*"as regards the proper interpretation to be placed on the provisions of sections 72, 624 and 626 of the Companies and Allied Matters Act, 1990, it is my view that these provision should be given their ordinary, plain and natural meanings where they do not admit of any doubt as it is indeed one of the first rules of interpretation of statutes that the words of statutes must be given literary meaning - see FELIX VS. THOMAS (1967) 1 A.C. 292 and BRONIK MOTORS VS. WEMA BANK LTD. (1983) 1 SCNLR 296."* C  
*and concluded thus:*

*I am of the strong view that section 72 does not apply retrospectively in this case and if the Companies and Allied Matters Act does not affect the case, the old common law position would be invoked and since the reliance placed on the issue of implied new contract was nowhere averred, going to no issue, then the pre-incorporation contract cannot be expressly or much less impliedly ratified after incorporation.* D

*As I said earlier on, the gravamen of this appeal is the outcome of what is the interpretation of the combination of Sections 72, 624 and 626 of the Companies and Allied Matters Act to the set of facts in this case. If the provisions do not apply, then we have to fail back on the common law position and I hold that they do not apply."* E

With profound respect to their Lordships of the Court below, I think they were wrong in the interpretation they placed on sections 72(1), 624(1) and 626 of CAMA. Before proceeding to show why, in my respectful view, they were wrong, I think it is necessary to dispose of the issue of retrospectivity raised both in that court and this Court and which strongly influenced the minds of their Lordships of the Court below. The rule that the company is not bound by a pre-incorporation contract purportedly made by it on its behalf, even if ratified by it after incorporation, is a rule of common law and not a statutory provision. Therefore, the question of section 6 of the Interpretation Act being brought to bear on the construction of section 72 does not arise. Repeal of an earlier statute is not an issue in this appeal. In any event, it cannot override clear provisions of a statute. F  
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True enough, CAMA first came into force on 2nd January 1990 but this date was by Decree No. 32 of 1990, titled Companies and Allied Matters (Amended) Decree which came into force on October 10 1990, change to 31st

December, 1990. Decree No. 32 however, validated all acts and things done under CAMA from 2nd January 1990 to 30th December 1990. That of course, takes care of the latter part of the observation of Sulu-Gambari JCA when he said:

*"It seems clear beyond doubt that whether a court has jurisdiction to enforce rights or entertain matters brought before it has to be considered at the time when the cause of action arose. The companies and Allied Matters Act did not come into force when the cause of action arose or when the action was filed in the year 1989. The ruling appealed against in this case was delivered on the 24th April, 1990 and the repealing Act, that is the Companies and allied Matters Act, was first made to be operative on the 2nd January, 1990 but was later amended and the date of its commencement was fixed at 30th December, 1990. This was a period well after the ruling appealed against was delivered."*

As to the former part of the above passage, it is not in dispute that the action leading to this appeal was filed in 1989. It is equally not in dispute that the application to stay proceedings was filed on 28/12/89 by the Appellant. Hearing of the application began on 25th of January 1990 and was concluded on 24th April 1990 when ruling was delivered by the learned trial Judge. During all this time CAMA had come into force. If, therefore, section 72(1) applies to the Respondent it is of no moment that the law was not in force when the action was brought. The application to stay proceedings is a matter of procedural law not substantive law and I can see nothing to prevent the Appellant invoking CAMA in support of the validity of the 1979 agreement.

I now come to the construction of sections 72(1), 624(1) and 626 of CAMA which is the crux of this appeal. Reading Section 624(1) (b) along with section 72(1) and applying it to the case on hand, section 72(1) would read:

*"Any contract or other transaction purporting to be entered into by Societe Generale Bank of the company prior to its formation and ratified by the company after its formation, the company shall become bound by and entitled to the benefit therefore as if it has been in existence at the date of such contract or other transaction and had been a party thereto."*

**Since Section 624(1)(b) applies Section 72(1) to all companies existing at the time CAMA came into force and the Respondent was one of such existing companies, and since it is a matter of general practice that companies, immediately after their incorporation, ratify contracts made on their behalf before incorporation, the law must intend that section 72(1) would apply to pre-incorporation contracts already ratified by existing companies as well as to such contracts yet to be ratified. In my respectful view this is the only logical and reasonable construction to be placed on section 72(1) when read along**

**with section 624(1)(b). If it were to be otherwise, the law maker would have provided that in the case of existing companies section 72(1) would only apply to pre-incorporation contracts that may subsequently be ratified.**

The issue here has nothing to do with retrospectivity of a statute but with the construction to be placed on its provisions. I do not think section 651(2) of CAMA helps the Respondent either. On the contrary, if anything, it makes the ratification by the Respondent of the 1976 Agreement to have effect as if it was given under the Act (CAMA). This further reinforces my view that in the application of section 72(1) to existing companies, ratification of a pre-incorporation agreement need not be after the coming into force of the Act; it preserves equally ratification done before the Act.

**With the conclusion I have just reached that section 72(1) read along with section 624(1)(b) applies to the Respondent, I must hold that the Court below was in error to hold as it did. I must equally hold that as the 1976 agreement was ratified by the Respondent after its incorporation and as the agreement is validated by section 72(1) of CAMA the Respondent is bound by the arbitration clause in that agreement and the learned trial Judge was right, therefore, in ordering a stay of proceedings of Respondent's action pending the outcome of arbitration between them.**

I, therefore, allow this appeal and set aside the judgment of the Court below. I restore the order of the trial High Court. I award to the Appellant E N1,000.00 costs of this appeal and N1,000.00 costs of the appeal in the Court below.

### WALI JSC

I have read before now, the lead judgment of my learned brother Ogundare, JSC, and I entirely agree with him that there is merit in this appeal.

The purpose of the provisions of sections 72(1), 624(1) (a) to (d), 626 (a) - (c) and s. 651(2) is to make the ratification of pre-incorporation contract entered into by the promoters of a company liable and binding on it after its formation. These statutory provisions have altered the position under the Common Law as decided in Kelner v. Baxter (1866) L.R. 2 C.P 124.

Section 72(1) of the Companies and Allied Matters Act, 1990 provides as follows:-

"72. (1)<sup>3</sup>

(2) *Prior to ratification by the company, the person who purported to act in the name of on behalf of the company shall, in the absence of express*

<sup>3</sup> See p. 641 G for s. 72 (1)

*agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof."*

The provision of s. 72 (supra) read together with s. 651(2) which also provides thus:-

"651. (1) Subject to the provisions of this section, the Companies B Act 1968 and the Companies (Special Provisions) Act shall, on the commencement of this Decree, be repealed"<sup>4</sup>

(2)<sup>4</sup>

makes it abundantly clear that the Management Agreement which was ratified by the Board of Directors of Societe Generale Bank (Nigeria) Ltd., the Respon- C dent, at its Meeting on 8th March, 1977 wherein it was provided:-

*"That the Management Agreement dated 7th July, 1976 between the Nigeria founders of the Company and Societe General Paris, a copy of which was marked Exhibit B duly initiated by the Chairman for authentication purposes and laid on the table is hereby ratified.",*

D is binding on the respondent. Since from that time the Defendant/Appellant had been providing services to the Respondent as contained in the Management Agreement, S. 651(2) of the Act makes it abundantly clear the retroactivity and retrospectivity of the provisions of Sections 72(1) and 624(1) of the Act. The provisions are so revolutionary and accord with the modern trend in E commercial activities. They have remedied the mischief created and perpetuated by the common Law.

It is for this and the more elaborate reasons given in the lead judgment of my learned brother Ogundare JSC, that I also hereby allow the appeal, set aside the judgement of the Court of Appeal and restore the Ruling and F orders of the lagos High Court given by Adeniji, J, on 24th April, 1990. N1,000.00 costs is awarded against the Respondent to the appellant in this appeal, and N1, 000, 00 in the court below.

G **KUTIGIJSC**

I read before now the judgment just delivered by my learned brother Ogundare J.S.C. I agree with his reasoning and conclusions will also allow the appeal, set aside the judgment of the Court of Appeal and restore the Ruling of the trial High Court delivered on 24th April, 1990. I endorse the order for costs.

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<sup>4</sup>See p. 642 F for s. 651 (2)

**MOHAMMED JSC**

I agree with the opinion of my learned brother, Ogundare, J.S.C. in the judgment just read, that the lower court is wrong in the interpretation it gave to sections 72(1) and 626 of Companies And Allied Matters Act (CAMA) on the question of pre-incorporation contracts.

At common Law, a pre-incorporation contract was not binding on B the company because there was no principal on behalf of whom an agent could have contracted. The company was not permitted to ratify or adopt it, and it could not, after incorporation, enforce the contract, nor sue, e. g. for damages for breach of the contract- Natal Land etc. Co. Ltd. v. Pauline Colliery Syndicate Ltd (1904) A.C. 120. These common law rules were a source of C considerable inconvenience for the promotion of business. They have now been altered by Section 72(1) of CAMA which provides as follows:

*"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 D 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."*

The intention of the legislature in enacting Sections 72(i), 624(i), and 626 of CAMA is quite clear, It is relevant to re-emphasis that the rule of E construction of statute is to adhere to the ordinary meaning of the words used according to the intent of the legislature. The provisions of sections 624 (i) and 626 make it abundantly clear that existing companies who wish to ratify pre-incorporation contract agreements could do so because the Act (CAMA) applied to them. In section 650(i), the interpretation of words used in part A of F CAMA, "Company" or existing company means:

*"a company formed and registered under this Act or, as the case may be, formed and registered in Nigeria before and in existence on the commencement of this Act".*

This amplifies what I have said above that existing companies could, G under the provisions of CAMA, ratify pre-incorporation contract agreements which their promoters entered into before incorporation.

For these reasons and the fuller reasons in the lead judgement I allow this appeal and set aside the judgment of the lower court. The cross-appeal is also dismissed for the reasons given above. I abide by all the consequential H orders made in the lead judgment including the award on costs.

**IGUHJSC**

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Ogundare, J.S.C. He has exhaustively considered all the issues canvassed before us in this appeal and I agree entirely with the reasoning and conclusions therein reached. There is nothing more I B can usefully add.

Consequently, I too, allow this appeal and abide by the order as to costs made in the leading Judgment.

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