

# **An Examination of the Nature of the Rights of Shareholders under (The) Statutory Contract Created by Section 41 of the CAMA 2004**

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## **Abstract**

*In company law jurisprudence there is a special contract that has pervaded the issue of the nature of the rights of shareholders under section 41 of the Company and Allied Matters Act 2004. It is known as 'Statutory contract' or 'Contract of membership' under Nigerian company law jurisprudence while under the United Kingdom (UK) Companies Act 2006, it is known as 'Statutory contract' or 'Corporate contract'. This Statutory contract is so important and fundamental to company law that it can be found in almost all the company legislations in common law jurisdictions; in the UK it can be found in section 33 of the Companies Act 2006 and, in the Bahamas, in section 11 of the Companies Act 1992. The central continuing theme of this article which is examined in this work is the effect of section 41 of the CAMA 2004 as it concerns the rights shareholders may exercise as a result of having a role to play in the management of a company (which is impari materia to section 33 of the UK's Companies Act 2006). This article concludes that section 41 of the CAMA is a broader and more inclusive provision because it places an obligation to observe and perform the provisions of a company's constitution (the memorandum and articles of association) as it relates to not only the company and its members (as section 33 of the UK's Companies Act dictates), but also the officers of the company while also accommodating outsider rights via section 41(3) of the CAMA 2004, contrary to English judicial precedents.*

**Keywords:** contract, rights, shareholders, membership, company. CAMA, 2004

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## Introduction

The separation of the ownership and control of companies has always been recognised by company law and is in fact an inevitable and fundamental attribute of modern companies, particularly large companies.<sup>1</sup> Under the Companies and Allied Matters Act 2004,<sup>2</sup> there are two principal organs of a company which are the Management and the Membership. The Management embodies the board of directors which operate like ‘a government’; they are responsible for making decisions on behalf of the company and the Membership embodies the General Meeting<sup>3</sup> which generally means the totality of shareholders acting in a properly convened meeting. The law, as a matter of practice,<sup>4</sup> vests the directors with near-absolute powers of management<sup>5</sup> and the members do not have any power to influence the management of the company unless under some restricted exceptions.<sup>6</sup> The directors’ powers in management must, however, be balanced by the shareholders’ power of ultimate and residual control of the business of the company.

The powers of the shareholders under the CAMA 2004 include; default powers to act in any matter if the members of the board of directors are unable to act probably due to a deadlock, or are disqualified from acting in that respect; power to institute legal proceedings in the name of or on behalf of the company, where the board of directors refuse or neglect to do so; they also have power to ratify or confirm actions taken by the board of directors, and to make recommendations to the board of directors concerning actions to be taken by the board.<sup>7</sup> Additionally, the shareholders acting in the general meeting have power over the appointment and removal of

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<sup>1</sup> James Mcconville and Mirko Bagaric, ‘Towards mandatory committees in Australian companies’ [2004] (28) (1) *Melbourne University Law Review*, 125.

<sup>2</sup> Cap C20, LFN 2004 (hereinafter referred to as CAMA).

<sup>3</sup> The term ‘General Meeting’ applied in both its ordinary and anthropomorphic meaning.

<sup>4</sup> Kunle Aina, ‘Strategies for Enforcing Shareholder Rights in Corporate Governance in Nigeria’ [2014] *A Journal of the Society for Corporate Governance Nigeria* <[https://www.academia.edu/7583449/STRATEGIES\\_FOR\\_ENFORCING\\_SHAREHOLDER\\_RIGHTS\\_IN\\_CORPORATE\\_GOVERNANCE\\_IN\\_NIGERIA](https://www.academia.edu/7583449/STRATEGIES_FOR_ENFORCING_SHAREHOLDER_RIGHTS_IN_CORPORATE_GOVERNANCE_IN_NIGERIA)> accessed on 20 December, 2019.

<sup>5</sup> *Bamford v. Bamford* (1970) Ch. 212.

<sup>6</sup> Section 63 of CAMA 2004.

<sup>7</sup> s 63(5) of the CAMA 2004.

directors<sup>8</sup> and also to amend the articles of association to alter the powers of directors (this may be referred to as an ultimate power of the shareholders in a company).<sup>9</sup>

The Securities and Exchange Commission Code of Corporate Governance (hereinafter called SEC Code) also enjoins the Board to ensure that shareholders' statutory and general rights are protected at all times.<sup>10</sup> The CAMA ensures that the management of a company acts in the shareholders' interest. For instance, under section 79 of CAMA 2004, shareholders are statutorily recognised as members of the company. Generally speaking, a shareholder is a part owner of any company who is entitled to take part in the decision making of the company.<sup>11</sup> Certain powers are conferred on shareholders by the CAMA 2004, which if exercised, are important in the administration of a company. These powers which are exercised at the General Meeting, include the power to appoint and remove directors,<sup>12</sup> approve the remuneration of directors<sup>13</sup> and even the power to institute legal proceedings to prevent the directors from entering into illegal or *ultra vires* actions,<sup>14</sup> power to declare dividends,<sup>15</sup> presentation of financial statements and the reports of Directors and Auditors,<sup>16</sup> the election of directors in place of retiring ones,<sup>17</sup> fixing remuneration and appointment of members of the audit committee.<sup>18</sup>

### **The Contract of Membership**

Under the repealed Companies Act 1968, and the extant Act, the company's constitution (meaning the memorandum and the articles) binds the members of the company and the company,

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<sup>8</sup> s 262 of the CAMA 2004.

<sup>9</sup> s 48 of CAMA 2004.

<sup>10</sup> Section 22, Securities and Exchange Commission Code of 2011.

<sup>11</sup> Eric Elujekor, 'Shareholders Rights and Responsibilities', available at <<https://www.proshareng.com/news/Stock%20&%20Analyst%20Updates/SEC-educates-shareholders-on-their-rights----/7994>> accessed on 20 December, 2019.

<sup>12</sup> s 262 of CAMA 2004.

<sup>13</sup> S 267 of CAMA 2004

<sup>14</sup> s 300 of CAMA 2004.

<sup>15</sup> s 379(1) of CAMA 2004.

<sup>16</sup> s 334 to 337 of CAMA 2004.

<sup>17</sup> s 248 of CAMA 2004.

<sup>18</sup> S 359 (5) of the CAMA 2004.

thereby establishing a statutory contract between the members themselves and between each member and the company.<sup>19</sup> Under the United Kingdom's Companies Act 1985, section 14, it was stated that:

subject to the provisions of this Act, the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.<sup>20</sup>

Its replacement in the Companies Act 2006, s 33(1), similarly but perhaps more tidily states:

The provisions of a company's constitution bind the company and its members to the same extent as if they were covenants on the part of the company and of each member to observe those provisions.<sup>21</sup>

Section 11 of the Companies Act of the Bahamas 1992 and section 14(2) of the Bahamian Act (International Business Company (Amendment) Act, 2004), which is in consonance with the above provision albeit with some alterity and dissimilitude, provide that the articles, when registered, bind the company and its members from time to time to the same extent as if each member had subscribed his name and affixed his seal to it, and as if the articles contained an agreement on the observance of the provisions of the articles on his part, his heirs, executors and administrators, subject to the act.<sup>22</sup>

In similar sturdiness, section 41 (1) to (4) of the Companies and Allied Matters Act 2004, provides that:

1. Subject to the provisions of the Act, the memorandum and articles, when registered, shall have the effect of a contract under

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<sup>19</sup> Alan Dignam and John Lowry, *Company Law* (Oxford University Press, 7<sup>th</sup> edition, 2012).

<sup>20</sup> *Ibid.*

<sup>21</sup> Carsten Gerner-Beurie and Micheal Anderson Schilling, *Comparative Company Law* (Oxford University Press, 2019).

<sup>22</sup> Omosebi Olajide, 'Examination of Section 41 (Contract)' [2018] *SSRN Electronic Journal* available at SSRN 2595781 accessed 31 December, 2019.

seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the articles, as altered from time to time in so far as they relate to the company, members, or officers as such.

2. All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company and shall be of the nature of a specialty debt.
3. Where the memorandum or articles empower any person to appoint or remove any director or other officer of the company, such power shall be enforceable by that person notwithstanding that he is not a member or officer of the company.
4. In any action by any member or officer to enforce any obligation owed under the memorandum or articles to him and any other member or officer, such member or officer may, if any other member or officer is affected by the alleged breach of such obligation, with his consent, sue in a representative capacity on behalf of himself and all other members or officers who may be affected other than any who are defendants and the provisions of Part XI of this Act shall apply.

Section 33(1) of the UK's Companies Act replaces section 14(1) of the UK's Companies Act 1985. The effect of the provision of a company's constitution constitutes a special kind of contract whose terms bind the company and its members from time to time. Like section 14(1) of the Companies Act 1985 (its predecessor), the provisions of section 33- i.e. the provision of a company's constitution- will not confer any right on persons other than the company and its members. Whereas, a literal interpretation of section 41 of the CAMA 2004 (as seen above) appears to be that upon the incorporation of a company and most importantly, upon registration of the constitutional documents of a company (i.e. the memorandum and articles of association), the constitutional documents have the effect of a contract under seal between the company and its members

and officers<sup>23</sup> and between the members and the officers themselves. The nature of this type of contract is to observe and perform the provisions of the company's constitution and even CAMA 2004 itself. Another unique feature of this contract is that unlike 'a contract under seal' it can be altered from time to time. Section 41(1) closes with 'in so far as they relate to the company, members, or officers as such'. This means that the contract binds the company, the members and the officers in relation to corporate matters that affect either the company alone or the members and the officers alone or both as the case may be.

Considering the provisions of the above sections in the company legislations of the various jurisdictions, there is an essential similarity in all these legislations to the same effect. This may be attributed to the fact that they are all common law jurisdictions. It can be seen from the above, that the effect of registering a company's constitution or what is otherwise known as the memorandum of association and articles of association of a company, is that it creates a contract between the members *inter se* and between the members and the company which is binding on all the parties to such a contract; members and officers. Section 41 of the CAMA states that 'the memorandum and articles, when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves'. This goes to prove that unlike the provisions of the UK and the Bahamas company legislations, section 41(1) of the CAMA is broader and more inclusive in the sense that the obligation to observe and perform the provisions of the articles is not just applicable to only the company and its members or viewed as a contract under seal between the company and its members but it goes ahead to bind the officers of a company.<sup>24</sup>

The UK legislation (s 33 of the CA 2006) likens this contract to a covenant which binds the company and its members as though

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<sup>23</sup> Section 567 of the CAMA 2004 (i.e. the interpretation section) defines the term 'officer' as follows: 'in relation to a body corporate, includes a director, manager or secretary'. In other words, the term 'officer' is used in relation to the management organ of a company.

<sup>24</sup> s 41 (1) and (4) of the CAMA 2004.

they individually signed and sealed the contract. This covenant is activated the moment the company's constitution is registered. Section 14(2) of the Bahamian Act adopts the same approach with the UK Act. It refers to this statutory contract as a covenant and it extends the purview of the people who are bound to observe the provisions of this covenant by including the heirs, executors and administrators of the members of the company. While section 41 of the CAMA refers to it as 'a contract under seal' which the members and the officers of the company and the company agree to be bound by.

The first thing to notice here is that it is an odd type of contract. It can be constantly varied by the members as the members and officers may alter the articles by special resolution if three-quarters of the members vote in favour of the resolution.<sup>25</sup> This is unlike a typical 'contract under seal' which is not as easy to vary. This means that one might buy shares in a company because certain rights were conferred in its articles but after joining the company, a special resolution may be passed despite voting against the special resolution, which altered those rights and which bound you because of section 33 of the UK's Companies Act to observe the new provisions. It also binds parties who were not privy to it, such as potential shareholders in the company.<sup>26</sup>

The reason for the creation of such an unusual contract was as an attempt to bridge the changeover between the deed of settlement company and the new registered company formed under the Joint Stock Companies Act 1844.<sup>27</sup> The practical problem for the legislature at that time was that, while the old deed of settlement established a contractual relationship between the members who signed it, there would be no new constitutional binding documents.<sup>28</sup> The solution was to create an artificial contract that would automatically bind all the members of the company.<sup>29</sup> The strength of the section is that it allows shares to be freely transferable by

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<sup>25</sup> s 48 of the CAMA 2004.

<sup>26</sup> s 37 and 41(1) of the CAMA 2004.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

removing the need for each member to explicitly agree to the constitutional documents of the company (i.e. the articles and memorandum of association) each time shares are traded. This avoids the hardship of having to renegotiate the contract every time shares change hands. Notwithstanding the foregoing, the existing company legislation in the UK still presents a great deal of uncertainty as to how exactly this artificial contract operates because section 14 of the UK's Companies Act 1985 and section 33(1) of the UK's Companies Act 2006 do not differ fundamentally in terms of their provisions.<sup>30</sup>

The issue which arises in terms of this statutory contract may sometimes be as to its interpretation or its effect but the major issue encountered as regards to this contract abounds in its enforceability by the members or shareholders and the officers. The question is: How simple is it for a shareholder or officer to sue to enforce his rights under the section 41 contract?

### **Approach to the Enforceability of the statutory contract created By Section 41 of CAMA 2004**

There is paucity of judicial decisions or case laws in this area of law in Nigeria. Thus, these writers will have recourse to some foreign cases based on similar or equivalent provisions of section 41 of Nigeria's CAMA 2004. The following examples should provide an illustration of the back and forth/controversial nature of the judicial debate on this area of law and the void which appears to have been filled by section 41 of Nigeria's CAMA on the effect of this unique type of contract.

The first case in consideration is the classic case of *Hickman v Kent or Romney Marsh Sheep-Breeders' Association*.<sup>31</sup> In that case, the enforceability of an article of association which allowed for arbitration proceedings where there was a dispute between the members and the company was at issue. Ashbury J examined all the authorities on the matter and considered that 'articles regulating the rights, and obligations of the members generally as such do create

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<sup>30</sup> *Ibid.*

<sup>31</sup> (1915) 1 Ch 881.



right and obligations between them and the company respectively'. Therefore, the article was contractually binding between the members and the company.

According to section 33, of the UK's Companies Act 2006, both the company and its members are bound to the same extent according to the provisions of a company's constitutional documents. However, this was not clear from the wording of the former provision i.e. section 14 of the Companies Act 1985. Despite the judiciary clarifying this issue, the opportunity was taken in the United Kingdom by the parliament when drafting the Companies Act 2006, section 33 to formally remedy this omission, and the company has now gladly been added to the parties which are bound to abide by the company's constitution.<sup>32</sup> Nonetheless, section 41 of the CAMA 2004 makes the above case relevant now in terms of understanding 'to what degree' the company, the members and the officers of a company are bound by the provisions of the constitutional documents.

Also, in the case of *Wood v Odessa Waterworks Co*,<sup>33</sup> Stirling J. considered that; the articles of association constitute a contract not only between the shareholders and the company but between each and every other shareholder. Another illustration of the same principle is to be found in the case of *Pender v Lushington*.<sup>34</sup> In this case, the articles also fixed a minimum amount of votes that each member could cast, namely hundred (100). To evade this rule, Pender transferred some of his shares into the names of nominees who were bound to vote as directed by him.<sup>35</sup> The shares were registered in their names. At a meeting, the chairman refused to count their votes. Pender sued for an injunction to restrain the chairman from declaring the nominee's votes invalid. He succeeded on the basis of the contract in the articles which bound the company to the shareholder.<sup>36</sup> It was concluded that shareholders had the right to vote as set out in the articles of association.

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<sup>32</sup> See n19.

<sup>33</sup> (1889) 42 Ch D 636.

<sup>34</sup> (1877) 6 ChD 70.

<sup>35</sup> Alan Dignam, *Hicks and Goo's Cases and Materials on Company Law* (Oxford University Press, 7<sup>th</sup> ed., 2011).

<sup>36</sup> *Ibid.*

Thus, from the above stated cases, the principle seems straightforward that a member can sue in relation to matters set out in the articles and also can be sued by the company in the same way.<sup>37</sup> However, the matter did not seem simple.<sup>38</sup> In the case of *Eley v Positive Government Security Life Assurance Co. Ltd.*,<sup>39</sup> Mr. Eley had been named as the company solicitor in the articles of association. He had been appointed as such but was subsequently removed. Mr. Eley asserted that he was a member of the company and sought to enforce the rights set out in the articles. He was unsuccessful as the court held that he was an outsider for all intents and purposes and, thus, could not enforce the contract in his capacity as a solicitor. The articles only gave him rights in his capacity as a member.<sup>40</sup> It is not clear from the decision whether the position would have been different if he had sued in his capacity as a member.

In the latter case of *Beattie v E and F Beattie Ltd.*,<sup>41</sup> the articles of the company provided for any dispute between a member and the company to be referred to arbitration. A director of the company who also held shares in the company sought to restrain legal proceedings against him on the basis of this article. The Court of Appeal held that he must fail as he sought to enforce the terms of the articles as an outsider, that is, as a director rather than as a member. It is, therefore, claimed that the articles of association cannot be enforced by a member or against a member in relation to outsider rights and obligations. In the light of the provisions of section 41 (1) to (4) of the CAMA 2004 it is apparent that the same position will not be taken by the Nigerian courts.

In the case of *Salmon v Quin and Axtens Ltd.*,<sup>42</sup> the company's articles gave the power of management to the board of directors but provided that joint managing directors each had a power of veto over certain key decisions. Salmon, one of the managing directors, sought to enforce this right of veto in relation to the resolution of the board. On behalf of himself and other shareholders,

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<sup>37</sup> See (n, 35).

<sup>38</sup> Simon Goulding, *Principles of company law* (Routledge-Cavendish, 1999).

<sup>39</sup> (1875) 1 Ex D 88.

<sup>40</sup> *Ibid.*

<sup>41</sup> (1938) Ch 708.

<sup>42</sup> (1909) 1 Ch 311.

he sued the company to prevent the company from acting in accordance with the resolution in breach of the article. The court concluded that he would succeed. He was then, able to enforce his right as a director by suing upon the membership contract. The case is clearly at odds with the later decision in *Beattie v E and F Beattie Ltd* which reiterated that the articles of association cannot be enforced by a member or against a member in relation to outsider rights and obligations and thus, seems to be wrongly decided in view of the extant law, Companies Act 1985. However, in the light of the provisions of section 41(4), the judgment of the court in *Salmon v Quin and Axtens Ltd* will be regarded as the true position of the Nigerian company law and valid for all intents and purposes.

Furthermore, on the enforceability of statutory contracts, the court in *Globalink Telecommunications Ltd v Wilmbury Ltd*,<sup>43</sup> held that an indemnity provision for directors contained in the company's articles was ineffective. It found that 'such a provision would not be binding because the articles do not constitute a contract between the company and its officer.'<sup>44</sup> There was need for a separate contract between the company and its directors.<sup>45</sup> The position in this case is inconsistent with section 41(1) of the CAMA 2004 which expressly spells out that 'the memorandum and articles, when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves'.

The above cases have given some illustration on the judicial debate which revolves around this statutory contract in the light of the provisions of the company's legislations of the United Kingdom. Furthermore, there has been much discussion about these cases and the effect of s. 33 contract which is *impari materia* to s. 41 contract under the CAMA. Gower has taken a traditional view that in the narrow sense, the membership contract is only enforceable in relation

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<sup>43</sup> (2003) 1 BCLC 145.

<sup>44</sup> Law Teacher, 'Company Law and Insolvency' [2013] <<https://www.lawteacher.net/free-law-essays/business-law/company-law-and-insolvency-business-law-essay.php/>> accessed 25 January, 2020.

<sup>45</sup> Nicholas Bourne, *Bourne on Company Law* (Routledge, 2013).

to membership rights and obligations.<sup>46</sup> In contrast, Lord Wedderburn<sup>47</sup> took the view that a member always has the right to have the articles and memorandum enforced. He took the view that there is one fundamental right of membership; to have the articles and memorandum enforced. Drury backs the view of Lord Wedderburn.<sup>48</sup> Other academics<sup>49</sup> presented a qualified version of Lord Wedderburn's thesis that a member may sue in respect of a right set out in the articles. Goldberg argues that a member has a contractual right to have the company's affairs conducted by the appropriate organ while Prentice argues that it is necessary to ask whether the particular provision affects the company's ability to function.<sup>50</sup>

*Rayfield v Hands*<sup>51</sup> is an interesting case which perhaps coincides with either theory and illustrates the breakdown between membership and management rights in small private companies. In this case, a provision in the articles states that every member wishing to transfer his shares should notify this to the directors, and that the directors would be obliged to purchase the shares at a fair price. In this company, all of the shareholders were directors. The claimant informed the directors of his wish to sell his shares and then he sought to enforce the article against them when they refused to take them as stipulated under the Articles. The court held that the article imposed a contractual obligation against the directors in their capacity as members. This case reiterates the fact that members of a company may sue another member on the obligations created by the articles of association of the company without joining the company as a party. It is the opinion of these writers that this was a case between the claimant and the directors as members of the company,

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<sup>46</sup> Gower and PL Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 2003).

<sup>47</sup> Lord Wedderburn, 'Shareholders' Rights and the rule in *Foss v. Harbottle*' [1957] (16) *CLJ* 194.

<sup>48</sup> *Ibid.*

<sup>49</sup> GD Goldberg, 'The Enforcement of Outsider Rights under S. 20(1) of the Companies Act 1948' [1972] (35) *MLR*, 362; GD Goldberg, 'The Controversy on S. 20 Contract Revisited' [1985] (48) *MLR*, 158; G. N. Prentice 'The Enforcement of Outsider Rights' [1980] (1) *Co. law*, 179.

<sup>50</sup> See (n, 35).

<sup>51</sup> (1958) 2 All ER 194.

so the directors were not regarded by Vaisey J in their capacities as officers. However, in the light of section 41(1) and (4) of the CAMA 2004 there is little doubt that the same perspective will not be upheld given the applicability of statutory contracts to both the members and the officers.

Furthermore, a company, for instance, cannot by a provision in its memorandum and articles authorise a scheme of reconstruction which disregards the rights of dissentients under sections 110 to 111 of the United Kingdom's Insolvency Act 1986. In the case of *Bisgood v Henderson's Transvaal Estate Ltd*,<sup>52</sup> the company in a general meeting resolved to carry out a scheme whereby each fully paid one (1) share was to be exchanged for one (1) share in a new company, to be credited as paid up to an amount of 87½ p. Under the scheme, the 'new' shares of those who dissented were to be sold *en bloc* for what they would fetch, and the proceeds distributed *pro rata* amongst them. The company's memorandum and articles of association purported to authorise such a transaction but it was held by the court to be unlawful (being an outright exception to the provisions of section 41 of the CAMA which states that the statutory contract is binding on the members and officers of a company).

The question involved is whether by clauses even in the memorandum of association of a company limited by shares, the limit upon the shareholder's liability can be raised- whether the constitution of the company can provide that the majority may impose upon the minority a scheme under which the member must either come under an increased liability or accept such compensation as the scheme offers him. Section 161 of the Companies Act 1862<sup>53</sup> protects the dissentient member by securing him the value of his interest to be determined by arbitration or agreement. The purpose of schemes such as that here in question is to evade or escape the provisions of that section. Their object is to impose upon the shareholders what is generally called an assessment-to require that in a limited company after the shares are fully paid, the shareholder must either come under liability to make further contributions to

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<sup>52</sup> (1903) 1 Ch 743 (CA).

<sup>53</sup> The Companies Act 1862 was an Act of the Parliament of the United Kingdom regulating UK company law, which presently is the Companies Act 2006.

capital or submit to take, not the value of his interest to be determined by arbitration or agreement, but such satisfaction as the scheme offers him. The satisfaction commonly means, and in substance means in this case, the surrender of his interest in the company. The question is whether the reorganisation scheme contained in the agreement and resolutions is *intra vires*. The argument is that it is because it is justified by clauses in the memorandum of association. The purpose of the memorandum and articles is not confined to defining and limiting the purposes of the corporation; it extends also within proper limits to defining and ascertaining the rights of the corporators (which is in this case, the shareholders).

It is not in dispute that within proper limits the memorandum and articles may provide how, as between the corporators/shareholders, the corporate assets shall be dealt with after liquidation but in this, as in many matters, there are limits imposed by the statutes. It is quite axiomatic that there are matters in respect of which the constitution of the company cannot provide that the corporator/shareholder shall not enjoy rights and immunities which the statute gives him. For instance, s 82 of the Companies Act 1862<sup>54</sup> empowers a contributory to present a winding up petition. His right in that respect cannot be excluded by the articles.<sup>55</sup>

Thus, upon a like principle the articles cannot exclude a shareholder from his right of dissent under s 161 of the Companies Act 1862. It is, therefore, not necessarily true that, because there are found in the memorandum and articles clauses such as those upon which the question here arises, the corporators/shareholders as individuals are contractually bound by them.<sup>56</sup> The question is not whether each individual shareholder/corporator can bind himself in respect of his distributive share in the assets. The question is whether, consistently with the statutes, the constitution of the company can be such that every shareholder shall in the matter of distribution and further liability-be bound by the vote of the majority.

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<sup>54</sup> s 124, Insolvency Act 1986.

<sup>55</sup> *Re Peveril Gold Mines* (1898) 1 Ch 122 (CA).

<sup>56</sup> See s 41 of the CAMA 2004.

In the matter of liability upon his shares the statute provides in plain terms that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount unpaid on his shares.<sup>57</sup> Thus, any attempt to define the constitution of the company as that the member shall in any event be liable for a larger sum, is in breach of the statute and is *ultra vires*. Any clause which can be used to maintain a scheme which imposes upon the member the alternative of accepting liability for a larger sum of being dispossessed of his status as a shareholder upon terms which he is not bound to accept are *ultra vires*.

In view of the aforementioned, a company cannot contract out of the provisions of the statute<sup>58</sup> even though its memorandum and articles of association provide otherwise. In the light of the statutory contract created by section 41 of CAMA 2004, it is to be noted that the section is not to be interpreted in isolation as can be seen in the opening paragraph 'Subject to the provisions of the Act...'. This means that even the agreement likened to have the effect of a 'contract under seal' under section 41 of the CAMA 2004 is to be interpreted in conjunction with sections 537-540 of the CAMA which provide for arrangement and compromise of companies.

In summary, the provisions of section 41 of the CAMA 2004 which spells out the binding nature of the statutory contract created by this section on the company, the members and the officers is to be interpreted in conjunction with other sections of the CAMA 2004. It is also worthy of mention that majority of the contradictory and rather complex case laws analysed above may not be applicable in our legal system given the more inclusive stipulation and the position of section 41 of Nigeria's company legislation which expands the scope of persons bound and capable of enforcing the statutory contract created by the said section.

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<sup>57</sup> s 38(4) and s 74(2)(d) of the IA 1986.

<sup>58</sup> As seen in the case of *Russell v Northern Development Bank* (1992) 1 WLR 588.

## **An Examination of the Nature of the Statutory Contract Created in Section 41 of CAMA 2004**

The statutory contract which is also regarded as, contract of membership, is so important and fundamental to company law jurisprudence that it can be found in almost all company legislations in common law jurisdictions, for example, Nigeria, The Bahamas and the United Kingdom. Alongside the orthodox principle in the case of *Salomon v Salomon & Co Ltd*,<sup>59</sup> the statutory contract or contract of membership is one of the fundamental principles of modern company law. The applicable common law jurisdictions in this work are United Kingdom, The Bahamas and Nigeria. However, for this section of the work, these writers will place focus on the Nigerian company law jurisprudence.

In Nigeria, this statutory contract is created by section 41 of the Companies and Allied Matters Act (CAMA) 2004. Thus, the nature of this statutory contract is now examined;

1. It is an odd and unique/peculiar contract which defies the conventional nature of a usual contract. This contract is said to be an odd contract because a contract generally requires certain ingredients in order to amount to an enforceable contract and these are offer, acceptance and consideration, among others. However, under this unique contract, the parties to this contract never really agree to the contract and thus, it is in sharp contrast with the conventional nature of a contract where parties would mutually agree given that this contract is created as a matter of law when the constitutional documents of the company have been registered. This is unlike the conventional contract where A makes an offer to B and B either accepts/rejects the offer and consideration is offered in exchange for a service among others, for a contract to be said to have been created in law.
2. It appears that this contract is futuristic in nature which again, defies the conventional nature of a contract. An orthodox contract borders on the present relations of the contracting parties; however, the statutory contract created by s 41 of the CAMA 2004 speaks futuristically. In stating this, there is need to

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<sup>59</sup> (1897) AC 22.



reiterate the provisions of sections 41 and 37 of CAMA 2004 which must be read in conjunction with each other in order to appreciate the point being made here.

- i) Section 41(1) of CAMA 2004<sup>60</sup> provides as follows; Subject to the provisions of this Act, the memorandum and articles, when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and the officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered from time to time in so far as they relate to the company, members, or officers as such.
- ii) On the other hand, section 37 of CAMA 2004<sup>61</sup> provides as follows; As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum *together with such other persons as may, from time to time, become members of the company...*

What this means is that this contract will bind those who are not parties to it and who become members in future. At this point, it is necessary to note how one may become a member of a company. Section 79 of CAMA 2004 provides that subscribers of the memorandum of a company and every other person who agrees in writing to become a member of a company and whose name has been entered in the register of members shall be regarded as a member of the company. It needs to be borne in mind however, that for certain provisions of the Act, a member is defined to include; the personal representative of a deceased member or any person to whom share have been transferred or what is rather known as transmitted (in law) by operation of law.<sup>62</sup> Thus, one can become a member of a company either by subscription, by purchase of shares or by inheritance.

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<sup>60</sup> Cap C20, LFN 2004.

<sup>61</sup> *Ibid.*

<sup>62</sup> s 302 of CAMA 2004.

3. Another nature of this contract is that it is a contract under seal. This can be seen from the provisions of section 41 of CAMA 2004 which provides that;

subject to the provisions of this Act, the memorandum and articles, when registered, *shall have the effect of a contract under seal...*

For this point, it is worthy to note that the statutory contract is a very special contract which is higher than an ordinary contract and therefore, enjoys a certain degree of sacrosanctity. An example of another form of contract under seal is a contract for sale of land which is usually embodied in a deed.<sup>63</sup>

4. This contract is also unique because it can be altered from time to time. In considering the alteration of statutory contract, it is important to note how a memorandum or articles of association of a company may be altered and for this, sections 45 and 48 of the CAMA 2004<sup>64</sup> can be considered. Nonetheless, emphasis is also placed on the provision of section 48 of CAMA 2004 which provides that;

Subject to the provisions of this Act and to the conditions or other provisions contained in its memorandum, *a company may by special resolution alter or add to its articles.*

Thus, even though it is a unique contract under seal, it can be amended from time to time although by following the provision of section 48 of CAMA 2004 which provides that it may be altered by special resolution.

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<sup>63</sup> See s 52 of the Law of Property Act 1925.

<sup>64</sup> Cap C20, LFN 2004.

### **Rights of Shareholders under (The) Statutory Contract under Section 41 of the CAMA 2004**

In the light of the provisions of section 41 CAMA, it appears that all the members and officers and the company, as seen in section 37 of the CAMA 2004, and impliedly all the future members of the company, have covenanted to abide by all the provisions of the memorandum and articles of association. Furthermore, it should be well noted that, the rule in *Foss v Harbottle*,<sup>65</sup> prohibits members from suing for a wrong that is done to a company and provides that in such a situation it is only the company that can sue or be sued on that wrong as ‘proper plaintiff’. The statutory codification for this orthodox principle is found in section 299 of the CAMA 2004.<sup>66</sup> It is the opinion of these writers that based on the fact that a statutory contract has been characterised as a ‘contract enforceable *inter se*’, that each member and officer of a company can sue based on section 41 of CAMA 2004 if there is a violation of any of the provisions in the articles or even in the memorandum of association.

In addition to the above, it should also be noted that a company’s memorandum and articles of association may be supplemented by a shareholders’ agreement. A shareholders’ agreement can be described as a contract, usually of quite formal kind, entered into by the shareholder either at the time of the company’s formation or at some subsequent time. For instance, where a family company in need of extra capital to finance an expansion of the business invites an outsider to join the company as an additional shareholder, a shareholders’ agreement will usually be drawn up. It is worthy of note that for a shareholders’ agreement to be fully effective, it is necessary that all the members for the time being should be made parties to the agreement and so the use of a shareholder’s agreement is practicable where the membership of the company is not too large.

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<sup>65</sup> (1843) 67 ER.

<sup>66</sup> Section 299 of the CAMA provides as follows; Subject to the provisions of this Act, where an irregularity has been committed in the course of a company’s affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct. This goes to show that members cannot sue on matters which borders on procedural irregularity as only the company has the power to ratify such irregularity.

The case of *Russell v Northern Development Bank*,<sup>67</sup> sheds light on how a company's articles of association may not be the final word on how the members' and the company's rights and obligations are delegated. As a result of the uncertainty surrounding section 14 of the Companies Act 1985 which is now 33(1) of the Companies Act 2006, shareholders' agreements have become a common feature. In this case, the House of Lords considered a shareholders' agreement where the company agreed not to increase the share capital of the company without the agreement of all the parties to the shareholders' agreement.<sup>68</sup> The company tried to increase the share capital of the company and one of the shareholders who had been a party to the agreement objected and tried to enforce the agreement. The statutory conflict here was between the shareholders' agreement and section 121 of the Companies Act 1985, which allowed companies to increase their share capital, if their articles contain an authority. The article of the company did provide such authorisation.<sup>69</sup>

The House of Lords found that the agreement of the company not to increase its share capital was contrary to the statutory provision and consequently, unenforceable. However, the court did not declare the whole shareholders' agreement invalid, just the company's agreement not to increase their share capital.<sup>70</sup> This meant that it could not be enforced against the company by the shareholder who objected but could enforce it against the other members. As all the members of the company were parties to the shareholders' agreement this has the same effect as if the company was bound. The shareholders could not therefore, vote to increase the share capital. In other words, a company cannot contract outside statutory provisions. Thus, even if a shareholder in this instance cannot sue the company because a company cannot contract out of the provisions of a statute or in a manner contrary to the statute, by virtue of a shareholders' agreement of which almost all the members

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<sup>67</sup> (1992) 1 WLR 588.

<sup>68</sup> Alan Dignam and John Lowry, *Company Law* (Oxford University Press, 7th edition, 2012), 169.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

are parties, one can still sue all the parties to the agreement and this would have the same effect as if the company itself was bound to the agreement.

As considered in section 2.0 of this work, the most common problem with a statutory contract is in its enforcement and as seen from the judicial approach to the issue of enforcement of statutory contracts, the law surrounding the operation of statutory contract is complex, confusing and contradictory because it is dominated by layer upon layer of statutory case law. However, section 41 of the CAMA 2004 appears to reconcile and mitigate the complexities involved with enforcing a statutory contract by statutorily overturning decisions such as that in *Beattie v E and Beattie Ltd* by expanding the scope of persons bound and capable of enforcing the statutory contract created by the said section to include officers and not just members of the company and the company itself.<sup>71</sup>

### **What then is the Nature of Rights that are Enforceable under the Statutory Contract?**

When it comes to statutory contracts, the nature of the rights/incidents upon which a member can sue are often rights incidental to or associated with his membership of the company or associated with being an officer of the company. This means that although the cases bordering on the enforcement of statutory contracts can be confusing or contradictory, in the light of section 33(1) of the Companies Act 2006 the courts will usually enforce statutory contracts in favour of any member if he is seeking to enforce any of his rights as a member i.e. rights qua member. For instance, the rights stated in sections 81 and 114(b) of the CAMA 2004 i.e. the rights to attend any general meetings and the right to vote as rights attaching to the shares of a company respectively.<sup>72</sup> Adio JSC in the Nigerian case of *Iwuchukwu v Nwizu*,<sup>73</sup> observed that by being registered as a holder of shares in a company, the registered holder becomes entitled to certain rights, benefits and privileges. Except as otherwise provided by the law and the

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<sup>71</sup> (1938) Ch 708.

<sup>72</sup> See also s 41 of the CAMA 2004.

<sup>73</sup> (1994) 7 NWLR Pt 357; 379.

provisions of the memorandum and articles of association of the company, he has the right to sell, mortgage or otherwise dispose of the shares. He is entitled to receive dividends on the shares registered in his name and to keep the dividend so received for his own use.<sup>74</sup>

Reiterating the orthodox principle in *Foss v Harbottle*,<sup>75</sup> a member cannot sue for any wrong done to the company because that is strictly the business of the company. From the decision of the court in the case of *Eley v Positive Government Security Life Assurance*,<sup>76</sup> it was established as a matter of principle that the articles of association of company does not create a contract between the company and an outsider, who in this case was Mr. Eley, the company's solicitor and thus, cannot be enforceable by an outsider. This case reiterates the fact that only members of a company can sue on statutory contracts. Another case which reiterates this position is the case of *Beattie v E and F Beattie Ltd*<sup>77</sup> where the court established that the articles of association cannot be enforced by a member or against a member in relation to outsider rights and obligations. In the opinion of these writers, given the clear provisions of section 41 of CAMA 2004 this position may not be upheld in the Nigerian jurisdiction given its broader scope.

This dictum of the court in the case of *Beattie v E and F Beattie*<sup>78</sup> is in line with Lord Wedderburn's<sup>79</sup> view that every member has a personal right under s 33 of the CA 2006 (which is equivalent to s 41 of CAMA 2004), to see that the company is run according to the articles, except those already identified as concerning internal procedures only which according to the orthodox principle in the case of *Foss v Harbottle*<sup>80</sup> (which is statutorily codified in s 299 of CAMA 2004) which provides that only a company can sue and be sued for a wrong done to him and thus, for matters which border on internal or procedural irregularity a member

<sup>74</sup> Olakunle Orojo, *Company Law and Practise in Nigeria* (LexisNexis Butterworths, 5<sup>th</sup> ed., 2008), 199.

<sup>75</sup> (1843) 67 ER.

<sup>76</sup> (1875) 1 Ex D 88.

<sup>77</sup> (1938) Ch 708.

<sup>78</sup> *Ibid.*

<sup>79</sup> Lord Wedderburn, 'Shareholders' Rights and the rule in *Foss v Harbottle*' [1957] (16) *CLJ*, 194.

<sup>80</sup> (1843) 67 ER.

may not be allowed to litigate on it. In the Nigerian case of *Elufioye v Halilu*,<sup>81</sup> Karibi-Whyte JSC summed up the rule in *Foss v Harbottle*<sup>82</sup> as follows;

This principle is founded on the rationale that since the rectification of the wrong or irregularity is *intra vires* the company or association which can rectify the act complained of, by the majority who have the power to do so, it is an idle exercise for the court to interfere. The final say being the decision of the majority, it can always get its wishes done. Hence, for such actions concerning wrongs to the company, the company and not any other person is the proper plaintiff.

In this case, the plaintiffs were members of a union operating in the financial services industry. The first to eleventh defendants were part-time officers elected to the union in 1985. The plaintiffs had commenced an action at the High Court for determination of a number of issues relating to the term of office of the defendants, and for injunctive relief. The matter was heard *ex parte*, and an interim relief was granted. On application by the defendants, the interim order was set aside. The plaintiffs appealed to the Court of Appeal which ruled that the rights of the plaintiffs to a fair hearing had been violated, with the result that it was necessary to allow the appeal.<sup>83</sup> The decision of the High Court setting aside the interim order was set aside. Aggrieved by the Court of Appeal's decision, the defendants appealed to the Supreme Court. This was the first appeal.<sup>84</sup>

The second appeal, the conflict between the parties concerned the scope of the right of individual members of the union to institute an action. Rule 7(v) of the union's constitution conferred on a member a right to initiate action, whenever any breach of the constitution arose, and at the expense of the individual concerned.

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<sup>81</sup> (1993) LCN/2247 (SC).

<sup>82</sup> (1843) 67 ER.

<sup>83</sup> *Elufioye v Halilu* (SC 310/1989) (1993) 7.

<sup>84</sup> *Ibid.*

The defendants were opposed to an unfettered exercise of the right on the ground that it would overrule the common law rule in *Foss v Harbottle*.<sup>85</sup>

It can be concluded from this that some rights are personal and others are not. How can one then tell if a right is a personal right? Lord Wedderburn in his article on *Foss v Harbottle*<sup>86</sup> set out a list of rights the courts have in the past considered personal in nature, what he referred to as incidents of membership. These included voting rights (confirming sections 81 and 114(b) of CAMA 2004), share transfer rights, a right to protect class rights, pre-emption rights, the right to be registered as a shareholder and obtain a share certificate, the right to enforce a dividend that has been declared and to enforce the dividend declaration procedure,<sup>87</sup> the right to appoint directors in accordance with the articles<sup>88</sup> and other procedural rights such as notices of meetings.<sup>89</sup> Lord Wedderburn<sup>90</sup> developed the thought that a member would sometimes be able to implement indirectly an outsider right as long as he made it clear that he was doing this in his capacity as a member.

In accordance with this line of thought, if a right is an incident of membership, a member may sue on it. On this note, it should be well noted that participation in the management of a company is not an incident of membership. Nonetheless, it should be stated that the provisions of section 41 particularly subsections (1) and (4) have expanded the scope covered by the companies legislation of our country of legal heritage (the UK). This means that by virtue of the above section, both the rights of a member and an officer of a company are enforceable under a statutory contract and a member or an officer may sue on it. Furthermore, section 41(3)<sup>91</sup> gives an outsider the power to appoint or remove any director or other officer of the company provided the memorandum or articles of

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<sup>85</sup> *Ibid.*

<sup>86</sup> Lord Wedderburn (n, 47)

<sup>87</sup> See ss 379 and 380 of CAMA 2004 for the declaration of dividends and profits.

<sup>88</sup> See s 248 of CAMA 2004.

<sup>89</sup> Alan Dignam and John Lowry, *Company Law* (Oxford University Press, 7th edition, 2012).

<sup>90</sup> *Ibid.*

<sup>91</sup> See p 4.



association of a company states so. This goes to show that there now exist rights that even outsiders may sue on, contrary to the decision of the court in *Eley v Positive Government Security Life Assurance*<sup>92</sup> where it held that an outsider for all intents and purposes, cannot enforce a right contained in the articles of association of a company.

In the event that a member's personal right has been infringed upon, that member does not have an absolute right to sue. This is because in seeking to bring an action in this circumstance which is an exception to the rule in *Foss v Harbottle*,<sup>93</sup> as established in the case of *Edwards v Haliwell*,<sup>94</sup> there are two hurdles which must be overcome;<sup>95</sup> first, the bar on enforcing so-called 'outsider' rights conferred on a member by the articles of association; and second, the difficulty in predicting when the court will hold that the breach of a provision in the company's constitution is a mere 'internal irregularity' of procedure as seen in section 299 of CAMA 2004, and therefore a wrong to the company, as opposed to a constitutional infringement which can be regarded as a matter of substance for which a member can sue. Thus, difficulties which surround the enforceability of insider rights such as the above listed hurdles, and the contradictory decisions of the courts are the reasons why one cannot readily denote that the law surrounding statutory contracts is certain. This confirms what was earlier posited by the writers that the law surrounding statutory contracts (as depicted in section 33(1) of the CA 2006) is contradictory and complex.

From the observation of Olatawura JSC in the case of *Globe Fishing Industries Ltd v Coker*,<sup>96</sup> the dividing line between personal and corporate rights *is very difficult to draw*, and perhaps the most that can be said is that the court will be inclined to treat a provision in the memorandum or articles as granting a member a personal right only if he has an interest in its observance that is distinct from the general interest that each member has in the company that adheres to

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<sup>92</sup> See (n, 39).

<sup>93</sup> *Ibid.*

<sup>94</sup> (1950) 2 ALL ER 1064.

<sup>95</sup> Alan Dignam and John Lowry, *Company Law* (Oxford University Press, 7th edition, 2012); 197.

<sup>96</sup> (1990) 7 NWLR Pt 162, 265.

the conditions of its constitution.<sup>97</sup> The above observation goes to show that the question on the effect of the statutory contract is not easy to answer because the court in the above case acknowledged that the dividing line between personal and corporate rights *is very difficult to draw*. Nonetheless, in the light of section 41(1) to (4) of the CAMA 2004,<sup>98</sup> particularly subsection (1), these writers are of the opinion that since corporate rights are enforceable in the sense that a statutory contract binds the company, the members and the officers in relation to corporate matters, personal rights are also enforceable as they relate to the members and officers of the company. However, the writers posit that the observation of Olatawura JSC in the above case demonstrates that the issues raised in this area of law are yet to be dealt with sufficient clarity.

Another important thing to note under the nature of the rights enforceable by shareholders, is that the directors of a company are not normally in a fiduciary position towards the shareholders individually. This goes to show that a shareholder cannot sue a director for a duty he owes to the company by asserting that he has the right to do so as a shareholder. The case of *Percival v Wright*<sup>99</sup> explains this point. In this case, the plaintiffs offered to sell their shares, and the defendants, who were the chairman of the board and two other directors, agreed to buy them at £12.50 per share. After completion of the transfers, the plaintiff discovered that at the time the board had been negotiating with an outsider for the sale to him of the company's whole undertaking at a price which represented well over £12.50 per share, but this information had not been disclosed to the plaintiffs. In fact, the takeover negotiation ultimately proved abortive. The plaintiffs claimed that the directors had a fiduciary relationship with them as shareholders and sought to avoid the transfers on the grounds of non-disclosure; however, the court held that there was no fiduciary relationship between directors and the shareholders individually.<sup>100</sup>

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<sup>97</sup> Robert Pennington, *Principles of Company Law* (Butterworths; 4<sup>th</sup> ed., 1979), 588.

<sup>98</sup> See p 4.

<sup>99</sup> (1902) 2 Ch 421.

<sup>100</sup> Stephen Judge, *Q & A Revision Guide: Company Law* (Oxford University Press, 2012).

The above case reiterates the position that the duties under the provisions of the CAMA 2004 in sections 279, 280, 282 and 287, are fundamentally owed to the company and not to the shareholders. Furthermore, it has been recently held in the case of *Towcester Racecourse Co Ltd v The Racecourse Association Ltd*<sup>101</sup> that in the absence of special provisions in the articles or some collateral agreement between the company and its members, neither the company nor its directors owe any direct legal obligations to its members as such. Therefore, no terms can be inferred which would have the consequence of making the company or its directors contractually responsible to its members for the way it carried out its functions. In essence, the shareholders cannot sue the directors for duties not owed to them but to the company.

## Conclusion

This article has examined the nature of the rights of the shareholders under the statutory contract created by section 41 of the Nigeria's Companies and Allied Matters Act (CAMA) 2004<sup>102</sup> and it was discovered that this area of law drawing from the English decided cases analysed above is pervaded with inconsistency and irreconcilable authorities.<sup>103</sup> In some cases, the court, have decided that the rights are enforceable and in some others, not enforceable. However, the key points to note are that; a statutory contract is odd in nature owing to the way it differs from a conventional contract, it is a contract under seal; it is futuristic in nature, and can be altered from time to time by a special resolution.

This article discovered that in dealing with this vital area of law, there is a need to strike a sharp distinction between personal and corporate rights and perhaps, due to the difficulty involved in doing this, this area of law is yet to be concluded with sufficient clarity. Nonetheless, given the provisions of section 41(1) to (4) of the CAMA 2004, particularly subsection (1), these writers posit that

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<sup>101</sup> (2003) 1 BCLC 260.

<sup>102</sup> Equivalent to s 11 of the Companies Act of the Bahamas, s 33 of the Companies Act 2006 and s 14 of the Companies Act 1985 of the United Kingdom.

<sup>103</sup> See for example the decisions in the cases of *Salmon v Quin and Axtens Ltd* (1909) 1 Ch 311 and *Beattie v E and F Beattie Ltd* (1938) Ch 708.

since corporate rights are enforceable in the sense that a statutory contract binds the company, the members and the officers in relation to corporate matters, personal rights are also enforceable as it relates to the members and officers of the company.

Therefore, the effect of section 41 of the CAMA 2004 is to bind the company itself by the terms of the articles, as well as the members and officers of the company. Thus, abiding strictly by section 33 of the CA 2006, rights usually associated with the membership of a company are rights such as the right to partake in the sharing of dividends, the right to vote, the right to attend any general meeting, which the English courts are usually inclined to enforce. Whereas on the other hand, those rights that are not incidental to membership which is technically referred to as outsider rights such as the right to be appointed as a company solicitor/director in a company even under a contract; *Eley v Positive Government Security Life Assurance*,<sup>104</sup> a right to ensure that no further share capital would be created or issued without the consent of each of the parties to the agreement; *Russell v Northern Development Bank*,<sup>105</sup> may not be enforced by the English courts. However, section 41 (1) and (3) of the CAMA 2004 has resolved this confusion by expressly providing that the rights of an officer of a company are also enforceable and that provided the constitutional documents empower an outsider to appoint or remove any director or other officer of the company, such power shall be enforceable by the outsider notwithstanding that he is not a member or officer of the company.

It should be noted that even the duties of a director which span from sections 279, 280, 282, 283 and 287 of the CAMA 2004, are not enforceable by shareholders on the authorities of *Percival v Wright and Towcester Racecourse Co Ltd v The Racecourse Association Ltd*,<sup>106</sup> as these duties are not fiduciary duties individually owed to the shareholders but duties owed to the company. In this regard, in the event of a breach of any of these

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<sup>104</sup> (1875) 1 Ex D 88.

<sup>105</sup> (1992) 1 WLR 588.

<sup>106</sup> (2003) 1 BCLC 260.

duties, following the decisions of the court in *Foss v Harbottle*<sup>107</sup> and *Elufioye v Halilu*,<sup>108</sup> only the company may sue on that breach. The statutory equivalent of this principle being section 299 of the CAMA 2004.

Finally, after a review of authorities, both statutory and judicial, it would appear that in dealing with this complex area of modern company law, it appears to be settled that the company in any litigation bordering on this area of law, should be treated as a party to the contract created by virtue of section 41 of the CAMA 2004 contained in its own memorandum and articles of association; *Hickman's case*,<sup>109</sup> and that the statutory contract created by section 41 of CAMA 2004, may contain rights which are directly enforceable by one member against another; *Rayfield v Hands*;<sup>110</sup> *Iwuchukwu's case*,<sup>111</sup> or by one officer against another. Thus, the scope of section 33 of the CA 2006 is narrow and section 41 of CAMA 2004 has expanded its scope in relation to 'who may sue on a statutory contract' and 'what rights are enforceable under this contract'.

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<sup>107</sup> (1843) 67 ER.

<sup>108</sup> (1993) LCN/2247 (SC).

<sup>109</sup> (1915) 1 Ch 881.

<sup>110</sup> (1958) 2 ALL ER 194.

<sup>111</sup> (1994) 7 NWLR Pt 357, 379.