An Unjust Enrichment Approach
Tob Ponzi and Pyramid
Schemes In Nigeria

Abstract

The paper makes the assertion that a difference exist between Ponzi and pyramid schemes even though both often occupy same square, especially in raising identical legal challenges. It argues that the traditional bankruptcy rules should be made more potent by supplementing them with principle of unjust enrichment. Accordingly, it presses a legal regime to make 'net-gainers' in the Ponzi and pyramid schemes to disgorge their illegal and unjust enrichment to 'net-losers.' It recommends the adoption of the remedial bent to unjust enrichment adopted by the Canadian jurisdiction as a good way forward in addressing the concerns of net-losers. It argues that the approach is of particular interest because the claimant need not establish a trust relationship with the defendant to succeed in reversing the unjust enrichment of net-gainers to make restitution. It therefore recommends an aggressive monitoring of potential Ponzi arrangements.

Introduction

One of the features of capitalist economy is the freedom of public and private individuals or groups to carry on economic or commercial activities such as production of goods and rendering of services subject to regulations and laws. The main reason for these business ventures is to make profits from the resources invested. Due to the importance of corporate bodies to the economic growth and development of any nation, the states make adequate provisions by way of statutes or customs to ensure their survival and the protection of the business interests of the stakeholders. These laws and the regulations made under them, also, serve to check the activities

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*Agbo, Festus Okpoto, Esq, Lecturer Nigeria Law School, Yenagoa Campus.

of the fraudsters and corporate insiders that are inimical to the sustenance of the companies.

In Nigeria, for an instance, the Companies and Allied Matters Act[1] (hereinafter referred to as CAMA) is the central statute that regulates corporate and related matters. For a company to operate in Nigeria, it must be registered with the Corporate Affairs Commission (hereinafter referred to as CAC), which is the statutory body created to administer CAMA. Whereas some companies can take off after incorporation under CAMA without further assurances; banks, and other financial institutions must obtain licences from the Central Bank of Nigeria (hereinafter referred to as CBN), and register with Securities and Exchange Commission (hereinafter referred to as SEC), a statutory body created to administer the Investments and Securities Act[2] (hereinafter referred to as ISA). They are, also, required to register and insure their assets with the Nigerian Deposit Insurance Corporation[3] (hereinafter referred to as NDIC).

The foregoing requirements for banks and similar companies are to ensure the protection of investors. Notwithstanding the provisions of these laws, many fraudsters have successfully duped the unsuspecting investing public through floating of illegal banks and other financial companies popularly known as 'wonder banks' in Nigeria. They invite the public and vigorously campaign for deposits of funds, promising mouth-watering returns on such investments within a short period of time. Some billions of Naira have gone down the drain through these schemes. Why do fraudulent businesses still strive in Nigeria?

Apart from general greed, illiteracy, and unawareness, the most astounding factor for the continual perpetration and success of the fraudulent schemes in Nigeria is the ability of the fraudsters to keep and enjoy the proceeds of their illegal businesses. In this work, efforts shall be made to distinguish between Ponzi and pyramid schemes; examine the relationship between the investors and promoters or managers of the companies, following and

[1] Cap C20 Laws of the Federation of Nigeria (LFN), 2004. See ss. 1 and 7 for establishment and functions of CAC.
[2] Cap I24 LFN, 2004. See ss. 1 and 8 for the establishment, functions and powers of SEC.
[3] Cap N102 LFN, 2004.

tracing the property of investors, the legal and equitable remedies available to the victims of the schemes against the schemers and early participants in the schemes, the roles of tribunals and courts in fighting the schemes, particularly, in making the schemers and initial investors in the schemes refund stolen funds. References shall be made to the positions in the United Kingdom and the United States of America for comparative purposes. Conclusion and recommendations shall follow.

Ponzi and Pyramid Schemes Distinguished

A Ponzi scheme is a fraudulent investment business where the operators, individual or corporate, pay returns to investors from new funds invested by new members rather than from the profits generated in the course of the business. Operators of Ponzi schemes normally entice new investors by offering abnormally higher returns than other normal investments within a short period of time.[4] The schemers sometimes offer more returns if the interest is left in the account instead of being paid out. The scheme is named after Charles Ponzi, an Italian business man who heavily defrauded the investing public in Boston in the 1920s. It is a fraudulent investment operation that pays interests to its existing investors with the inflowing money of the later investors rather than from profits. The schemers often rely on the ignorance of the investing public, and use big terms such as: global currency arbitrage, hedge future trading, high-yield investment programmes or offshore investment just to sound sophisticated and legitimate. Earlier investors always gain in the schemes and their testimonials help perpetuate the schemes. Later investors lose. The investors do no more than bring their funds. The Ponzi schemer undertakes to invest the funds and to pay returns. On the paper everything looks perfect and the investors think they are making a mint. But it soon collapses, leaving its investors high and dry.

On the other hand, pyramid scheme is also a fraudulent investment operation where the operators offer big returns on investment within a short period. Pyramid scheme is in many respects similar to Ponzi scheme. The major differences are that: 1. Ponzi scheme is always fraudulent from the start but pyramid scheme can be genuine from the onset before it turns

[4] Umana Bank of mid 1980s in Port Harcourt Nigeria gave 100% interests to depositors within one month until it folded.

fraudulent; 2. Investors in pyramid schemes are expected to do more than contributing money: they help to recruit others into the scheme or help sell its product.

In Nigeria, there are plenty of both Ponzi and pyramid schemes. Ponzi schemers operate mostly in financial institutions. They solicit deposit of funds from the unsuspecting investing public with promises of huge interests within short time. Pyramid schemes operate by way of product-marketing companies.[5]

Relationship between investors and Promoters and Managers of Companies. The relationship between the investors or members of companies and the promoters or managers of companies is fiduciary in nature. This fiduciary relationship which the promoter bears to the companies is very significant as it is the basis for claims or remedies against erring promoters. Specifically, CAMA[6] provides that there is a trustee relationship between directors of companies and companies.

Promoters

A promoter is neither an agent nor a trustee of a company, he is a fiduciary to the company.[7] As such, he must deal with the company in the utmost good faith. A promoter who acquired any information or property in such circumstances in which it was his duty as a fiduciary to acquire it on behalf of the company, shall be made to account to the company for such property and for any profit made from the use of such property or information.[8] In *Jubilee Cotton Mills v Lewis*[9], a secret reward received by a promoter was liable to be accounted for. A subscriber may sue for damages for fraud where he subscribed on the strength of a false statement wilfully made by a promoter or for compensation for false and misleading statement in the prospectus.[10] There is no time limit for proceeding against erring promoter.[11]

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[5] Companies which recruit members to sell products, advance on the ladder and make profits are pyramid schemes. They can turn fraudulent if there is no good market for the goods and the promoters continue in business by using the gains of the later members to pay those who are on top of the rung, and file false accounts.

[6] S. 283(2) Companies and Allied Matters Act (CAMA)

[7] Ibid s. 61. See also *Garba v Sheba Int'l Nig Ltd* (2002) 1 NWLR (pt. 748) 327 at 401

[8] CAMA s. 62; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cases 1218 at 1236

[9] [1924] AC 958

[10] *Jacobus Marler Estates Ltd v Marler* (1913) 85 LJ 167

[11] CAMA s. 62

It should be noted that professionals who help in forming a company for fees are not regarded as promoters. A solicitor who prepares memorandum and articles of association and registers a company for a client who pays him a professional fee is not a promoter.[12] However, if the solicitor, valuer or accountant does more, for instance, helping the company to source funds or obtain a director, he will be regarded as a promoter.[13] In summary, a company can sue a defaulting promoter for damages, account for profits made at its expense and rescission of contract.[14]

Director

A director is both an agent and a trustee of a company.[15] It has been held that generally directors do not owe fiduciary duties to shareholders but owe them to the company. However, in certain special circumstances, fiduciary duties carrying with them a duty of disclosure, can arise which place directors in fiduciary capacity vis-à-vis the shareholders.[16] The directors are under duty: to act in the best interest of the company; to avoid conflict of interest and making secret profit; to act with care and skill.[17] Failure to exercise reasonable care is actionable as negligence and breach of duty.[18] Directors are individually responsible for the action of the Board of Directors in which they participated.[19]

In summary, companies have the following remedies against defaulting directors: accounts for profit, rescission of contract, damages or restoration of company property; injunction or declaration; summary termination of directors' appointments. Unlike a company director, there is no fiduciary duty on the part of a company secretary in respect of his duties unless he is acting as an agent of the company. Then, he owes a fiduciary duty to the company and if he makes secret gains or allows his personal interest to conflict with his duties or uses confidential information got from the company for his own benefits, he must account for it.[20]

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[12] *Re Great Wheal Polgoot Ltd* (1883) 53 L.J. Ch. 24

[13] *Bagnall v Carlton* (1877) 6 Ch. D 371

[14] See J O Orojo, *Company Law and Practice in Nigeria*, Mbeyi Associates, 1992, 74-78

[15] CAMA s. 283 (1, 2); *Ferguson v Wilson* (1866) L. R. 2 Ch. 77; *G E. Ry v Turner* (1872) L. R. 8 Ch. 149 at 152

[16] Per Browne-Wilkinson, VC in *Re Chez Nic (Restaurants) Ltd* [1992] B. C. L. C.192 at 208

[17] See CAMA ss. 279(3), 280 (1), (2), 282 (1).

[18] Ibid s. 282 (2)

[19] Ibid s. 282 (3)

[20] Ibid s. 297

Following and Tracing

Following is the process of tracing asset in specie as it moves from hand to hand. Tracing is the process of identifying a new asset as substitute for the old.[21]Tracing describes the way by which the law allows the original owner of property to identify assets in the hands of a third party which represents it because they are its exchange products or proceeds.[22] In instances where the property especially money changes through many hands and mixes with other assets, tracing it may be challenging because of the many transfers, substitutions and mixing.

It is important to state that tracing is generally a mechanism for identifying the misappropriated property and not a remedy. However, tracing as a process is pursued with the object of providing a foundation for the assertion of rights or remedies. The original owner may decide to assert a proprietary right to the asset identified through the process of tracing, with the consequence that it is his property and it does not belong to the holder in whose hands it has been found. In the alternative, he may seek a purely personal remedy requiring that the holder of the identified asset make restitution of the value of the property he had received. The assertion of appropriate remedies in respect of assets identified by the rules of tracing has been termed "claiming". This purpose and nature of tracing was explained by Lord Millet in *Foskett v Mckeown*:

> Tracing is thus neither a claim nor remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property.[23]

The essence of tracing is therefore to discover the property to enable the original owner assert a personal or proprietary right to it. It is important to note that personal or monetary claim is useless where the person currently holding the property is insolvent. Proprietary right is better than personal

[21] *Foskett v Mckeown* [2001] 1 AC 102 per Lord Millet. See also Peter Birks, *Laundering and Tracing*, 1995; Festus Emiri, *The Law of Restitution in Nigeria*, Lagos: Malthouse Press, 2012, chapter 23.

[22] Robert Pearce & John Stevenson, *The Law of Trusts and Equitable Obligations*, 4th ed., New York: OUP, 2006, chapter 31; Festus Emiri & Ayuba Giwa, *Equity & Trust in Nigeria*, Lagos: Malthouse Press, 2012, chapter 34,

[23] [2000] 3 All ER 97 at 120

claim in two major ways: 1. It is not subject to be distributed amongst the holder's general creditors, and as such the claiming owner enjoys a priority which could not be achieved through a personal claim; 2. Again, the identified assets may be more valuable than the original property which has been traced into them. If so, a proprietary claim will enable the original owner to take the benefit of the appreciation which has occurred.[24]

Tracing could be in common law or in equity. Generally, there is an established limitation that the common law cannot trace into a mixed fund[25] but equity traces into mixed funds. In equity, geometric multiplication is curtailed by the equitable principle that the right to trace is lost as against a bona fide purchaser for value without notice. Geometric multiplication is also inhibited by the principle that a plaintiff is not allowed to recover twice for the same loss. Whilst restitution theorists have helpfully clarified the distinction between tracing and claiming, so that tracing is seen as a process and not a remedy in itself, it is submitted that the tracing process is inherently proprietary in nature. What is traced is not an abstract value but a property in specific assets.[26]

Injunctions

After the owner has followed or traced his assets to the hands of the defendant or third parties as the case may be, there may be need to obtain injunctions to restrain the holders of the assets from dissipating or removing them or destroying or hiding evidence relevant to the subsequent suit from the jurisdiction of the courts or tribunals. This is to enable the original owner to prove his case and enjoy the fruits of his judgment if he succeeds in getting one against the holder of his property.

An injunction is an equitable remedy by which court orders a person to refrain from a particular activity or conduct. Failure to obey a court injunction amounts to contempt of court which attracts sanctions such as fine, sequestration of property, or imprisonment. A third party who aids and abets a breach of court injunction will also be guilty of contempt, and third parties who nullify the effect of an injunction, say, publishing

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[24] Robert Pearce and John Stevens, op. cit, p. 865

[25] This in itself is a check against geometric progression or double claiming at common law.

[26] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 669 at 709 per Lord Browne-Wilkinson.

information which others have been ordered to refrain from publishing, will be in contempt by virtue of their knowingly interfering with the administration of justice.[27] For our purpose here, it is sufficient to briefly consider: Quia timet injunction, Mareva injunction, and Anton Piller injunction.

Quia timet injunction: This is an injunction aimed at preventing a threatened infringement of the plaintiff's rights, which infringement is yet to take place.[28] 'Quia timet' is a Latin phrase meaning 'he who fears'. Investors can utilise a quia timet injunction to prevent the managers of their investments from dissipating same if they have reasonable apprehension of fraud, instead of waiting until the harm is done. For a plaintiff to be entitled to a quia timet order, he must satisfy the court that the threatened harm is most probable to occur, and that if it is allowed to take place, it will render irreparable harm to him or his property. In the alternative, he will show that although the defendant has fully compensated him in law and equity concerning the damage he has suffered previously in the hands of the defendant, the defendant's earlier actions may lead to further suits.

In *A-G v Manchester Corporation*[29] Chitty J stated that the principle that could be extracted from quia timet authorities is that the plaintiff must show a strong case of probability that the apprehended mischief, will in fact, arise. However, in *Hooper v Rogers* Russell LJ suggested a different formulation thus:

> In different cases, differing phrases have been used in describing circumstances in which...quia timet injunctions will be granted... In truth it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties having regard to all the relevant circumstances.[30]

Mareva injunction: Mareva injunction is an ex parte order granted to prevent a defendant or a third party holding the assets/property of a defendant from dissipating or removing his assets from the jurisdiction of

[27] Robert Pearce & John Stevens op. cit. 44-45; Festus Emiri & Ayuba Giwa, *Equity & Trust in Nigeria*, Lagos: Malthouse Press, 2012, chapter 3.
[28] *Redland Bricks Ltd v Morris* [1970] AC 652 per Lord Upjohn
[29] [1893] 2 Ch. 87 at 92
[30] [1974] 3 WLR 329 at 334

the court so that there will be nothing remaining to satisfy a judgment which may be obtained against him at trial. Recently, it has been suggested that the jurisdiction extends to future assets of a defendant as well as those in existence as at the date the injunction was granted.[31] Again, in *Balkbank v Taher*[32], a bank was granted a world-wide Mareva injunction against the defendants, who were alleged to have acted fraudulently in respect of a joint venture, an allegation that failed in the Irish Courts. Mareva injunction takes its name from the case in which the jurisdiction was first exercised- *Mareva Compania Naviera SA v International Bulk Carriers SA*.[33] By Rule 25.1(1), (f) of the Civil Procedure Rules 1998 [UK], Mareva injunction is now called 'freezing injunction' in UK.

To be able to get a freezing injunction, the applicant has to show among other things: that he may likely get a judgment against the defendant for a certain or approximate sum, and that the defendant has assets within the jurisdiction to meet the judgment in part or in whole but that he may take steps designed to ensure that the assets are no longer available or traceable when the judgment is finally given against him.[34] In *Derby & Co v Weldon (No. 3 & 4)*[35], Lord Donaldson, MR, said that the fundamental principle underlying the jurisdiction to grant a freezing injunction is that no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case.

Where a freezing injunction is granted, the defendant is still entitled to draw upon his assets to fund his legitimate expenses including his reasonable expenses in defending the subsequent suit. Where the claimant seeks to assert a proprietary right to the property in the hands of a defendant, by asserting that he is a constructive trustee, and a freezing order has been granted, the mere fact that the defendant will not act in breach of the injunction by applying the property towards his expenses will not prevent him from being held liable for breach of trust if the proprietary claim is upheld and the property has been wholly or partially dissipated.[36] Similarly, the recipients of such property such as solicitors whose professional fees

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[31] *Sonico SACI v Novokuznetsk Aluminium Plant* [1998] QB 406 per Cole J
[32] [1994] 4 All ER 239, on Appeal [1995] 2 All ER 904 CA
[33] [1975] 2 Lloyds Rep 509
[34] *Z Ltd v A-Z* [1985] QB 558 at 585 per Kerr LJ
[35] [1990] Ch. 65 at 76
[36] *United v Mizuchi Bank Ltd v Doherty* [1998] 2 All ER 230

were paid it will not escape from possible future claims on the grounds that they had knowingly received trust property.[37]

Anton Piller: This is an order to prevent the defendant from destroying documentary or real evidence relevant to a subsequent action. It is now called a search order in UK. The order was first granted in *EMI v Pandit*[38], it was confirmed by the English Court of Appeal in *Anton Piller KG v Manufacturing Processes Ltd*[39] from where it took its name, and approved by the House of Lords in *Rank Film Distributors Ltd v Videos Information Centre*.[40] Though search orders are most appropriate in cases where it is suspected that pirating of music or film has taken place, there is no doubt that it comes in handy wherever documentary or real evidence could be destroyed or hidden in fraud-related cases.

For an Anton Piller order to be granted, the applicant must show that there is a strong prima facie case, serious potential damage, real possibility that evidence will be destroyed, and absence of real harm to the defendant.[41]

Equitable and Legal Remedies available to Victims of Ponzi and Pyramid Schemes

Approaching the courts and tribunals

It is an elementary principle of corporate law that a company becomes a distinct and separate legal entity from its members and managers upon incorporation.[42] Not even having a controlling number of shares in a company will annul its separate corporate legal existence.[43]

One of the implications of a separate legal personality of a company is that it can sue and be sued in its corporate name. Generally, no member or agent of a company should be sued for any wrong committed by a company. The company is to be sued for any wrong it commits. The wrong is always committed by human agents since the company relies on human agents to

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[37] Ibid

[38] [1975] 1 All ER 418

[39] [1976] Ch. 55

[40] [1982] AC 380

[41] Per Lord Ormrod LJ in *Anton Piller KG v Manufacturing Processes Ltd* (supra) at 62.

[42] See s. 33 CAMA, *Salomon v Salomon* [1897] AC 22, *Afribank Nigeria Ltd v M. Ent.* (2008) 12 NWLR (pt. 1098) 223

[43] *Okomu Oil Palm Co. Ltd v Iserhienrhien* (2001) 6 NWLR (pt. 710) 600 at 686

run. However, there are exceptions to this general rule, one of which is lifting the veil of incorporation. In *Chinwo v Owhonda*[44], the court held that allegation of crime lifts the veil of corporate or voluntary associations and opens up the body to judicial enquiry upon good and substantial facts placed before a court of competent jurisdiction. Again, in *Adeyemi v Lan & Baker Nig Ltd*[45], the court held that there is nothing sacrosanct about the veil of incorporation of a company. Thus, if it is discovered from the materials before a court that a company is a creature of a biological person be he a managing director or a director, and that the company is a device or sham or mask which he holds before his face in an attempt to avoid recognition by the eyes of equity, the court must be ready and willing to open the veil of incorporation to see the characters behind the company in order to do justice.[46]

Compensation

Ponzi and pyramid schemes are almost always fraudulent and therefore criminal. As such, the State could prosecute the schemers on fraud and economic crimes. If conviction is secured, compensation could be ordered by the court to be paid to the victim of the scheme besides imprisonment. Similarly, victims could bring a civil suit for damages or compensation. In *Pan African Bank v The State*[47], the trial court ordered the bank to pay N2.7m compensation to the victim of fraud perpetuated by the bank's former branch manager besides convicting and sentencing the fraudster to prison. Under sections 78 and 356 (1) of the Penal Code and Criminal Procedure Code respectively, the court can award compensation against convicts either in addition to or in lieu of any other punishment prescribed for an offence.

Restitution

An investor who has suffered a loss of his investment in a fraudulent Ponzi or pyramid scheme can sue the promoters of the scheme for restitution. Restitution is the response which consists in a defendant giving up to a plaintiff an unjust enrichment which he has received at his expense.

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[44] (2008) 3 NWLR (pt. 1074) 341 at 362
[45] (2000) 7 NWLR (pt. 663) 33 at 51
[46] H. Y. Bhashmus, Corporate Law and Practice, Enugu: Chenglo, 2013, 91-93
[47] (1997) 4 NWLR (pt. 499) 296 CA

Generally, restitution is effected by means of a personal claim so that the defendant will be ordered to pay to the plaintiff the money equivalent to the unjust enrichment received. This is restitution in the first measure and the measure of the restitution is the value received, that is, the extent to which the defendant had unjustly enriched himself at the expense of the plaintiff. However, Birks had argued that restitution could sometimes be effected by means of a proprietary remedy, so that the defendant could be forced to give up to the plaintiff any property in his hands which represents the unjust enrichment he received. This is called restitution in the second measure, and the measure of the restitution is the value surviving in the hands of the defendant.[48]

Resulting Trusts

Resulting trust is a trust which results in the event that the presumed or automatic intentions of the parties fail to materialise. Resulting trust could therefore be presumed or automatic in nature. Under the existing law, a resulting trust arises in two sets of circumstances: [A] Where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held in trust for A (if he is the sole provider of the money) or in the case of a joint purchase, by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebuttable either by the counter presumption of advancement or by direct evidence of A's intention to make an outright transfer. [B] Where A transfers property to B on express trusts but the trusts declared do not exhaust the whole beneficial interest, the remainder of the beneficial interest will automatically return to the beneficiary in resulting trust.[49]

Resulting trusts operate to reverse unjust enrichment. Once the plaintiff demonstrates that the defendant was unjustly enriched at his expense, he will be entitled to restitution. In *Lipkin v Karpnale*[50], the House of Lords held that unjust enrichment should be recognised as a valid autonomous

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[48] P. Birks, *Introduction to the Law of Restitution*, 1985, pp. 75-98, 358-401. See also Festus Emiri, *The Law of Restitution in Nigeria*, Lagos: Malthouse Press, 2012.

[49] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (supra) p. 708, per Lord Browne-Wilkinson.

[50] [1991] 2 AC 548

cause of action. Where a plaintiff demonstrates an entitlement to receive restitution from the defendant, the question which immediately arises is as to the nature of remedy available to him to effect such restitution. The plaintiff is generally entitled to a personal remedy, requiring the defendant to pay over to him an amount equivalent to the enrichment he had received.[51] If, however, it can be shown that the property constituting the unjust enrichment received by the defendant was subject to a trust, the plaintiff will be able to assert a proprietary claim to any assets remaining in the hands of the defendant which are the traceable proceeds of the unjust enrichment received. Such trusts will not arise expressly and there would be no grounds for finding a presumed resulting trust.

Birks had argued that a resulting trust should arise whenever a defendant receives an unjust enrichment conferred by mistake or under a contract the consideration of which wholly fails.[52] If such a resulting trust were to arise from the mere fact of enrichment, the plaintiff would be entitled to a proprietary remedy. Birks' thesis was considered in the *Westdeutsche*[53], where it was comprehensively rejected by the House of Lord, which preferred the critical approach of William Swadling.[54]

The *Westdeutsche* case involved an interest rate swap agreement between the plaintiff bank and the defendant local authority. Under the contract, the bank paid £2.5m to the authority. However, as a result of the House of Lords decision in *Hazell v Hammersmith and Fulham London Borough Council*[55], the contract between the parties was ultra vires the local authority and therefore void. The bank sought restitution of the balance of payment it had made together with interest. Before the House of Lords, the only remaining issue was the nature of interest payable on the award of restitution. If the bank was only entitled to restitution at common law, then the court would have no jurisdiction to award compound interest. However, the bank alleged that the payment had been received subject to a resulting trust, because the contract under which it was created was void,

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[51] But this remedy will be of a little use if the defendant is insolvent.
[52] P Birks, Restitution and Resulting Trusts, in Goldstein (ed.), *Equity: Contemporary Legal Development*, 1992.
[53] Supra at p. 709.
[54] [1996] 16 LS 133.
[55] [1992] 2 AC 1

thus rooting their claim in equity and entitling the court to award compound interest. However, Lord Browne-Wilkinson explained that the circumstances could not have given rise to a resulting trust because the intention of the parties as at the time of payment was that the money so paid should become the absolute property of the local authority and that even though it is true that the parties were under a misapprehension that the payment was made in pursuance of a valid contract, that does not alter the intention of the parties at the date the payment was made.

Even though the House of Lords rejected the adoption of a wider restitutionary resulting trust, this does not mean that a trust interest will never be raised for the purpose of reversing an unjust enrichment. Lord Browne-Wilkinson opined that although the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English Law, may provide a more satisfactory road.[56]

Constructive Trusts

The major analysis of English Law doctrine of constructive trust is that it has been used to describe a wide number of circumstances. This led Lord Millet to say that the use of the language of constructive trust has become such a fertile source of confusion that it would be better if it were abandoned.[57] It has been used to describe situations such as: the remedy available against a fiduciary who had made an unauthorised profit in breach of his duty; creation of a trust where parties make mutual wills. At its foundation, the term 'constructive trust' refers to the circumstances where property is subject to a trust by operation of law. In *Westdeutsche*, Lord Browe-Wilkinson identified a constructive trust as a trust which the law imposes on the trustee by reason of his unconscionable conduct.[58]

Significance of Constructive Trusts

1. **Misappropriated Property:** If the misappropriated property was not previously subjected to a trust; or if it was received in circumstances generating a fiduciary relationship between the recipient and the owner, it may be rendered subject to a

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[56] *Westdeutsche* supra at p. 716. But cf. Festus Emiri, The Place of Equity in the Modern Law of Restitution: An Exercise In Taxonomy, in Emeka Chianu, (ed.) *Legal Principles and Policies: Essays in Honour of Idigbe, JSC*, Benin City: University of Benin Faculty of Law, 2006, chapter 3.

[57] McKendrick, Commercial Aspects of Trusts and Fiduciary Obligations, 1993, p. 3

[58] *Westdeutsche* supra at 705. Robert Pearce and John Stevens, op. cit. p. 268

constructive trust in the hand of the recipient.[59] By means of such a constructive trust, the entitlement of the true owner is preserved in equity. In *Westdeutsche*, Lord Browne-Wilkinson held that a thief would hold the money he had stolen on constructive trust for the victim of the theft.[60]

2. **Receipt of Unauthorised Profits by a Fiduciary:** A constructive trust arises where a fiduciary receives unauthorised profits in breach of his duty of loyalty to the principal. A person who holds such a fiduciary position is under a duty not to abuse his position by receiving an unauthorised remuneration, or to gain by allowing his duty and interest to conflict. Equity will compel a fiduciary to retain unauthorised profits he receives on trust for his principal, who is entitled to claim an equitable proprietary interest in them or their traceable proceeds.[61]

3. **Personal Liability to Account as a Constructive Trustee:** The concept of a constructive trust is used to impose a personal liability to account upon a fiduciary who receives an unauthorised profit; a stranger to a trust who knowingly receives and dissipates trust property, and a stranger who knowingly assists in the commission of the breach of trust. But in *Paragon Fianne v DB Thakerar & Co*[62], Miller, LJ held that constructive trusts do not apply to cases of fraud, that equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. 'In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be liable to account as a constructive trustee. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were'.[63]

   However, given the confusion of terminology, the personal liability of a fiduciary to account for unauthorised profits; or of a stranger to account for the value of trust property he has received,

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[59] *Agip (Africa) v Jackson* [1991] Ch. 547

[60] *Westdeutsche* supra at 716

[61] Robert Pearce and John Stevens, op. cit. 272

[62] [1999] 1 All ER 400

[63] Ibid at 415

are better analysed as instances of claims to restitution in equity.

4. **Constructive Trusts Imposed to Prevent a Criminal from Benefitting from His Crime:** The basic principle of English and Nigerian Laws is that no criminal is allowed to retain the proceeds of his crime. In *Clever v Mutual Reserve Fund Life Association*[64], Fry, LJ held that 'no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. In *Re DWS [decd]*[65], a son who had murdered his parents' was not allowed to inherit their estate nor his illegitimate son because 'no issue shall take whose parent is living at the date of the intestate'.[66]

   However, where a criminal has received property into his hands in consequence of his crime, he will be subjected to a constructive trust in favour of those who would have been entitled to it in his place. This principle applies in two situations viz: property received from theft and property acquired through succession or survivorship from someone who died in consequence of a crime he committed.

Criteria for Establishment of a Constructive Trust

Common Intention: A constructive trust will only be established where the parties have a common intention to share the ownership of the property in question. The intention may be express or implied by the court from the conduct of the parties.

Detrimental Reliance: The mere fact of a common intention does not allow for the establishment of a constructive trust. The party claiming for a beneficial interest must demonstrate that he significantly altered his position or acted to his detriment on the basis of the common intention.[67] It is better to acknowledge openly that a constructive trust is imposed in equity without the consent- express, implied or imputed, of the constructive

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[64] [1892] 1 Q.B. 147 at 156

[65] [2001] Ch. 568

[66] S. 47 (1) (i) of the Administration of Estates Act 1925 [UK]

[67] *Llyods Bank Plc v Rosset* [1991] 1 AC 107

trustee. The trust is imposed because equity does not allow the legal owner to deny the claimant a beneficial interest.[68] Even in the case of *Westdeutsche*, Lord Browne-Wilkinson suggested that, unlike a resulting trust, a constructive trust is imposed on a trustee by law against his intentions.[69]

Commonwealth Approaches

Canada: Canada introduced the concept of 'remedial constructive trust' to effect restitution through the reversal of unjust enrichment. It moved away from the common intention of English courts. In *Pettkus v Becker*[70] the Canadian Supreme Court outlined three elements which must be satisfied to justify the imposition of constructive trusts: enrichment, corresponding deprivation and absence of any juristic reason for the enrichment.

Australia: More recently, Australia has favoured the imposition of constructive trusts on grounds of unconscionability. Deane J in *Muschinski v Dodds*[71] had this to say:
Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed intention... to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.
New Zealand: Courts in New Zealand reject the common intention but use the principle that constructive trust is imposed to fulfil the reasonable expectation of the parties.[72]

Development of Remedial Constructive Trusts

Prior to the Canadian Court's decision in the case of *Pettkus*, constructive trust was viewed in terms of the law of trusts where existence of fiduciary relationship needed to exist for it to apply. Dickson CJC had this to say:

> Until the decision of this court in *Pettkus v Becker*, the constructive trust was viewed largely in terms of the law of trust, hence the need for the existence of a fiduciary relationship. In *Pettkus v Becker* the

[68] Tipping J in *Lankow v Rose* [1995] 1 NZLR 227 at 293 CA
[69] See Glover and Todds, The Myth of Common Intention [1996] 16 LS 325; Riniker, The Fiction of Common Intention and Detriment [1998] Conv. 202
[70] (1980) 117 DLR 257
[71] (1985) 160 CLR 583 at 614
[72] See Cooke P in *Gillies v Keogh* [1989] 2 NZLR 327

> court moved to an approach more in line with restitutionary principle by explicitly recognising a constructive trust as one of the remedies for unjust enrichment. In finding unjust enrichment, the court...invoked three criteria namely: (1) enrichment (2) a corresponding deprivation and (3) absence of any juristic reason for the enrichment. The court then found that in the circumstances of the case a constructive trust was the appropriate remedy to redress the unjust enrichment.[73]

What it now means is that once the court finds out that someone has been unjustly enriched, a range of remedies may avail against him. The remedial constructive trust therefore constitutes one important judicial means of remedying unjust enrichment. Other remedies such as monetary damages may be available to rectify situations of unjust enrichment. It is important, therefore, to ascertain when and under what circumstances it is appropriate for a court to impose a constructive trust.[74]

Difficulties Associated With The Remedial Constructive Trusts

Uncertainty as to the cause of action: The remedial constructive trust is seen as one of the means by which restitution may be effected. The cause of action which gives rise to it is not therefore breach of fiduciary duty or inequitable conduct, which is the triggers for a constructive trust in English Law, but unjust enrichment. The Canadian courts have been quick to recognise and develop a general principle of unjust enrichment, whereas in England there has been a historical reluctance to adopt what has been seen as a vague and amorphous concept. In *LAC Minerals Ltd v Corona Int'l Resources Ltd*[75], the Canadian Supreme Court stressed that unjustness was not simply a vague concept of fairness. La Forest J pointed out that the determination that enrichment is unjust does not refer to abstract notions of morality and justice but flows directly from the finding that there is a breach of a legally recognised duty for which the courts will grant relief. Restitution is a distinct body of law governed by its developing system of rules.[76]

The uncertainty played itself out in *Korkontzilas v Soulos*.[77] Here, the majority of the Supreme Court of Canada held that a remedial constructive

[73] *Hunter Engineering Co Inc v Syncrude Canada Ltd* (1989) 57 DLR (4th) 321 at 348 cited in Pearce Joun and John Stevenson, op. cit at 319-320

[74] Dickson CJC in *Sorochan v Sorochan* (1986) 29 DLR (4th) 1

[75] [1989] 61 DLR (4th) 14

[76] Ibid at 45

[77] (1997) 146 DLR (4th) 214

trust was available even where there had been no unjust enrichment, and that it could be imposed where good conscience requires. If uncertainty is to be avoided, it is submitted that the dissenting minority opinion that a remedial constructive trust might only be imposed where there has been unjust enrichment should be taken as a certain position of the law.

Roles of the Courts and Tribunals in Fighting the Schemes

Courts and tribunals have great roles to play in curtailing Ponzi and pyramid schemes. The willingness of courts and tribunals to use the available legal and equitable remedies against the schemers will greatly reduce their incidence. The new commercial trusts: Kayford, Quistclose and Romalpa, should be utilised by the Nigerian Courts to reverse the unjust enrichment resulting from Ponzi and pyramid schemes.[78]

In the case of *Pan African Bank Ltd v The State*[79], the appellant bank's former Kano branch manager defrauded the PW5 of the sum of N3m which he collected from the victim to buy him foreign exchange. The trial court ordered the bank to pay the victim N2.7m for being negligent over its staff.[80] The problem was that the bank was not joined in the proceedings, and as such was not heard before the order was made by the trial court, on what basis the Court of Appeal set aside.

Similarly, in *Central Securities Clearing System v Securities and Exchange Commission*[81], the appellant a registered capital market operator applied for the review of order/decision of Administrative Proceedings Committee of SEC on account of involvement in trading in false securities. In April, 2002, SEC became aware of an alleged scam and fraudulent sale of shares of Nestles Foods Plc, Unilever Plc and other securities to the tune of about N318m. The fraud was allegedly perpetuated by a syndicate group through

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[78] Equity has moved from its traditional domestic domain into the markets. See generally OF Emiri and R. Abassah, *New Commercial Trusts: Remedial Advance or Bad Omen* in Emiri & G. Deindenomo [eds.], *Law, Oil and Contemporary Development Issues in Nigeria: Essays in honour of Honourable Justice Emmanuel Joot Igoniwari*, Lagos: Malthouse Press, 2008, 361-379. It is submitted that Kayford trusts (prepayment for goods which are not supplied) and Quistclose trusts (advancement of money for a purpose which fails) are similar in almost all respects to automatic constructive trusts discussed above.

[79] (1997) 4 NWLR (pt. 499) 296 CA

[80] The order was anchored on ss. 78 and 365 (1) of Penal Code and Criminal Procedure Code respectively

[81] Appeal No. IST/APP/01/2003. See also *Zegler House Assets Management Co. Ltd v Securities and Exchange Commission*, Appeal No. IST/APP/02/2003.

certain broking firms. The staff of the appellant acted in concert with the fraud syndicate. The respondent invited the appellant to its Administrative Proceedings Committee. The charges brought against the appellant include: employing manipulative and deceptive contrivance in securities transaction/trading, engaging in acts capable of affecting the investing public confidence in the capital market and failure to properly supervise its staff. The respondent after conducting a thorough investigation and hearing, held the appellant liable on all the counts.

The appellant was ordered by the respondent to compensate or buy back all the shares it traded on stock exchange in relation to the scam. The Tribunal in allowing the appeal in part held inter alia: that restitution means restoration of anything to its rightful owner, the act of making good or giving equivalent for any loss, damage or injury and indemnification. The principle of restitution is the need to discourage unjust enrichment. The Tribunal held that it is a settled law that the investors who lost their investment are entitled to be placed in the position in which they would have been if the appellant had not committed the breach; that the respondent was at liberty to award penalty provided it is within the ambit of the law.[82] Again, the Tribunal held that the failure of the appellant to detect the manipulation of the system amounted to a breach of duty, which the appellant owed the investing public and the attendant result was the massive fraud that occurred; that restitution where there are several parties is apportioned by the level of involvement of each party.

Dealing with early Investors/Gainers in the Schemes

The methods employed by the society to reverse the unjust enrichment of Ponzi and pyramid schemes primarily target the masterminds of the schemes. The State may prosecute the perpetrators of the schemes as agents of the fraudulent corporate organization. Civil suits could be initiated against them for compensation and restitution. What happens to those on the top of the rung, those who joined the scheme early and made abnormal gains by way of huge returns or interests before its eventual collapse? Let us look at instances of the schemes before we come back to this question. In the early 80s in Benin City, a famous investment house called Plan

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[82] See for instance s. 78 of the Penal Code which provides for fine in lieu of or in addition to other punishments for offences

Well Ltd reigned supreme. The promise of good returns lured many to sell their houses and landed properties to invest with Plan Well. In the end thousands committed suicide when they woke up to the news one morning that Plan Well offices were under lock and key. Those familiar with fake investment houses will remember the story of Umanah Umanah Bank in Port Harcourt which raised the profile of wonder banks in Nigeria in 1992. Like others, Umanah left many victims impoverished after his scheme failed. When he was arrested for running the illegal scheme, about N77m was recovered from him. He claimed that the amount was what he had left in his three houses. But the amount of money the security operatives found was actually about three times the money recovered. Depositors were paid 50% of their initial investments. Umanah was never prosecuted and the discrepancies in the reported recoveries were never accounted for.

THISDAY findings revealed that claims by 560,822 investors who have been defrauded have come to N106.9b resulting from the operations of over 440 illegal companies. Nospecto Oil & Gas Ltd accounted for 48% of those claims. To reduce the menace of illegal fund managers, the Securities and Exchange Commission has embarked on investors' education and a massive manhunt for these fraudsters. In December 2012, SEC sealed off the office of an illegal fund company called 'Avenue to Wealth' located at Olufunmilola Okikiolu Street Ikeja Lagos after several months of complaints from subscribers. It never registered with SEC, and it had operated for quite a time.

In 2013, SEC had in exercise of its investors' protection, market regulation and development mandate entrusted on it by ISA 2007[83], sealed up the offices of illegal fund managers in Jos, Lagos, Port Harcourt and Sokoto, and sanctioned some capital market operators in line with the zero tolerance policy for improper behaviour in the Nigerian Capital Market. For instance, SEC closed the Port Harcourt and Sokoto offices of the Women-in-Oil Ltd. The Women-in-Oil Ltd purporting to be an indigenous oil company, with headquarters in Port Harcourt, backed up by the Government of the Federation, explored the ignorance and poverty of the Nigerian women by promising them mouth watering returns and benefits on their investments

[83] Sections 1 and 8

which it routinely failed to fulfil. It claimed that the Federal Government had offset N120,000 company membership fees for each participant, and collected N8, 700 per person as the cost of legal certificate and verification by the Local Governments. Other alleged promises include: monthly profit sharing of up to N20,000, health coverage of medical bills for members' families, widowhood income support, access to unsecured business loan, car ownership through extension of credit with long pay off period, housing allowance and home ownership through access to a 30-year mortgage, fee legal defence in cases of victimization or oppression, technical training in oil and gas industry operations to enable access to employment opportunities in the sector as well as the opportunity to make friends and receive support from its over 200,000 women members.[84]

Ponzi and pyramid schemes are all over the world. As sophisticated as the United States security is, her citizens have been reaped off by many fraudulent investment schemes. We will make do with one notorious instance- the Bernard Madoff Ponzi scheme. Madoff ran a Ponzi scheme from around the 1970s. The fraud was exposed in 2008 after he had bilked investors out of $20m representing the actual investments of the investors.[85] He offered his investors returns too good to be true. By the combined use of freezing injunction and search orders, the court ordered him, his wife, his son to surrender their assets including those invested in other companies. The US District Judge Lawrence McKenna gave Irving Picard, the bankruptcy trustee, power to seize assets and records, demand documents, summon witnesses, and enter Madoff's residences around the world. Madoff was also banned from the securities industry, and his assets were to frozen.[86]

The 'claw back' provision of the New York Bankruptcy Act was used to compel the investors who withdrew from the scheme up to six years before it collapsed to return the alleged profits, and even parts of their initial investments. This is known as the legal doctrine of fraudulent conveyance in bankruptcy proceedings. Conscious avoidance also known as wilful ignorance or wilful blindness is a deliberate failure to learn information

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[84] For a detailed work on this part of this work, see Eromosele Abiodun, 'SEC, Ponzi Schemes and Investors Cry for Help,' *THISDAY* November, 2013, pp.
[85] On the paper the Bernard L. Madoff investments and Securities LLC was worth $65m.
[86] *SEC v Madoff* 08-10791 in US District Court Southern District of New York, Manhattan

which the law treats as actual knowledge. The early investors who had gained from the scheme are made to return their profits based on this principle of law. This is because the gainers cannot escape civil or criminal responsibility by deliberately shutting their eyes to something that would have been obvious on reasonable or diligent enquiry.[87] The return of the funds or forfeiture of assets for distribution to the victims of the victims was in addition to killing prison terms. Madoff pleaded guilty to a 3-count charge of frauds. He was sentenced to 150 years imprisonment in the federal prison at Butner North Carolina. His accounts manager Frank DiPascali was sentenced to 125 years of imprisonment.[88] JP Morgan was sued for violating the Bank Secrecy Act by failing to report the illegal activities of Madoff as early as 1994. It agreed to forfeit $1.7b.[89] The Nigerian Government, SEC and courts should emulate the American example.

Conclusion

The focus of this work is how to make gainers in the Ponzi and pyramid schemes disgorge their illegal and unjust enrichment. For the workers or agents of the schemes who bear fiduciary or trustee relationship to the company, there is less challenge in calling them to account for profits. What is novel is to ask a man who has made profits on his investments by way of dividends, bonuses, interests or returns to bring same back for the benefits of other shareholders upon the bankruptcy or insolvency and collapse of the company.[90] To achieve this end, the claimants have to follow or trace the money to its holders including the third parties. They have to obtain a freezing injunction or a search order to ensure that property is not removed from jurisdiction or evidence destroyed in respect of the subsequent action they intend to institute. Actions should be founded on resulting and constructive trusts.[91] The unjust enrichment approach of the

[87] In *Picard v Stanley Chais* 09-01172, who had benefitted from the scheme for at least 30 years, was asked to return the profits. His family withdrew more than $1b which is about more than 52% of their investment.

[88] He may likely get a more lenient sentence having agreed to be used, and actually used as a star witness for the prosecution of other five key employees of the Madoff scheme.

[89] The Government will use the money to make victims of Madoff scheme whole. See Christine Hurt, Is "Conscious Avoidance" the Next "Honest Services"? ,
htpp://www.typepad.com/services/trackback/6a00d8345157d569e20133f2421ea6970b, accessed on 28/3/14 10.36am; Benjamin Fischer, Insider Trading and Conscious Avoidance: Handling the Government's Most Powerful Tools, www.maglaw.com accessed on 29/3/14 12pm

[90] It should be pointed out that this is not the case in normal bankruptcy or insolvency of companies. Investors are called upon to return their profits in fraudulent investment schemes when the schemes collapse.

Canadian Courts is of a particular interest because the claimant need not establish a trust relationship with the defendant to succeed in reversing the unjust enrichment of the net-gainers.

The victims of Ponzi schemes could rely on the 'claw back' provisions of bankruptcy statutes to reclaim their lost investments. They could also institute 'conscious avoidance actions' to reverse the unjust enrichment of the early participants or investors in the fraudulent schemes, who ought to know that the profits they made were too good to be normal. The foregoing actions are in addition to the criminal prosecution of the managers of these funds including plea bargaining.[92] Victims of fraudulent schemes in Nigeria should use the above procedure and actions to reclaim their lost investments from both the managers and early investors who have withdrawn from the funds.

Recommendations

To check the activities of the Ponzi and pyramid schemes in Nigeria, and to reverse the unjust enrichment of both the managers of these schemes and the early investors who have benefited from the schemes, the following recommendations are made:

1. Enquiries should be made by the CAC, SEC, and the professional bodies to reveal the roles played by professionals in promoting, aiding and abetting fraudulent schemes in order to punish them adequately. This will serve as deterrent to other professionals who may wish to endorse or certify documents or reports for Ponzi and pyramid schemes without scrutiny.
2. The memoranda and articles of association of companies should contain clauses for the unlimited liabilities of corporate promoters, agents and managers of companies in the event of insolvency.
3. Courts should strive to do substantial justice in the cases of Ponzi and pyramid schemes brought before them.

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[91] Kayford, Quistclose and Romalpa trusts are the new commercial trusts that are similar to resulting trusts.

[92] See ss. 75 and 76 of the Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State 2011. Cf s. 14 (3) of the Economic and Financial Crimes Commission Act. The agreement by JP Morgan to forfeit $1.7b to the State in order to avoid prosecution for violating the Bank Secrecy Act in the Madoff Ponzi Scheme in the US is an instance of a negotiated plea.

4. The remedial constructive trust approach of the Canadian Courts should be adopted by the Nigerian courts in dealing with cases of fraudulent investment schemes so that once a claimant is able to prove unjust enrichment, the veil of incorporation is lifted to deal with the officers and early gainers involved in the schemes.
5. CAC and SEC should intensify their awareness campaigns to the public, letting them know that too high returns on investment within short periods of time is suspect and likely fraudulent.
6. CAC, CBN, and SEC should step up surveillance over companies especially finance/investment houses to ensure that companies that are not registered and licensed are not allowed to operate businesses. A situation where non-registered and unlicensed companies operate for years undetected until after much harm has been done to the unsuspecting investing public leaves much to be desired. In this regard, it is recommended that at the least CAC and SEC should establish liaison offices in each of the Local Government Area to verify the statuses of the companies operating there.
7. The public should be courage to report the existence of suspected fraudulent companies operating in their areas to the regulating authorities or to the law enforcement agencies.