THE EFFECT OF NOTICE OF MEETINGS

ON THE MEMBERS' FRANCHISE *

Abstract:

The import of meetings cannot be overemphasized in modern day corporate governance. It is an essential aspect of corporate governance. Meetings are usually summoned vide notice of meetings issued to those entitled to attend. Without which, the members who are entitled to attend will be unaware of such meetings, let alone attending. It is a notorious fact in Nigeria that some companies do not send notice of meetings to all their members. In some cases the notices were not sent timeously and are received several weeks after the meetings were held. What is the reason for this? Is it deliberate or as a result of inadvertence? What are the legal implications of non service of the notice on the meeting? And what are remedies available to the members who were disenfranchised as a result of the not service of the notice of meetings?

Introduction

Companies are created by statutes. They derive their existence from the enabling statutes or charters that gave rise to them. At the point of incorporation, they acquire legal personalities distinct from their promoters. Their artificial personality notwithstanding, they become bodies corporate; can own and transfer properties; sue and be sued; borrow money; enter into contractual relationship, and have perpetual succession.

The precursor to the modern day theory of corporate phenomenon evolved in England in 1897,[1] and spread to other jurisdictions through statutory and judicial authorities. Owing to legal and economic exigencies of the time, the corporate entity became capable of enjoying certain rights and their co - relative duties distinct from those attributable to its members. The theory of the pure legal fiction of the beast thus created cannot be over stretched because behind the facade are human entities through which they operate. Thus, a company although having a corporate personality, is deemed to have human personality through its officers and agents[2]. The officers and agents are usually the directors and other principal officers of the company. Viscount

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[*] C. Eric Nnadozie, Lecturer, Nigerian Law School, Yenagoa Campus. He is also a Notary Public and a Chartered Arbitrator.

[1] *Salomon v. Salomon & Co* (1897) AC 22.

[2] Per Aniagolu, JSC, in *Trenco Nigeria Limited v. African Real Estate Limited*, (1978) 1LRN 146 at 156; see also *Lennards Carrying Co. v. Asiatic Petroleum Ltd* (1915) AC 705 at 713 - 714, per Viscount Haldane, L. C.

Haldane, L.C., aptly stated in *Lennards Carrying Co. Limited v. Asiatic Petroleum Co. Limited*[3] thus,

> a corporation is an abstraction. It has no mind or will of its own any more than it has a body of its own; its active and directing mind must consequently be sought in the person of somebody who for some purpose may be called an agent but who is really the directing mind and will of the corporation...

Sequel to incorporation, the company carries on its legitimate business with capital obtained from its investors with the purpose of profit making or yielding returns on investment. Evidently, all the investors cannot be actively involved in running the affairs of the company. This is entrusted in the hands of a few individuals – the directors, managers, secretaries and other salaried personnel, thus, forming the management team. This necessitates the need for adequate safeguard to protect the interest of the investors who by law, are entitled to look after their investments in the company.

The corporate power is vested on the members and directors of the company. The members exercise this power at their meetings; and the directors when they meet at the Board level. *A fortiori*, company meetings consists of both the general and Board meetings. For a valid meeting of the company to be called, convened and held, adequate and proper notice of the meeting must be given. Failure to give notice of any meeting is fatal and vitiates the meeting. Sadly, there are not so infrequent cases of companies' neglect in sending notice of meetings to deserving members of the company. More regrettable is the fact that complaints of non receipt of notice of meetings are treated with levity. This ultimately results in poor attendance at meetings. Worse still, those who attend are not adequately apprised to actively participate at the meeting proceedings. This ugly trend, have no less inimical effects on the letter and spirit of the meeting. Hence runs contrary to the lofty ideals of good corporate governance. This article will highlight the legal requirements for valid notice of meetings; the various types of notices, and the remedies available to persons entitled to notice of meeting, but were not given. Generally, it is a modest contribution to shareholders activism in corporate governance in Nigeria.

Notice of Meetings.

Notice of Meetings is provided for in Section 217 of the Companies and Allied Matters Act, Cap C20 Laws of the Federation of Nigeria, 2004 (CAMA). Generally, notice is an advance intimation of the happening of an event, in this case the convening of a meeting. Notices serve several purposes. First, they give the members advance invitations to an impending meeting to enable them decide whether to attend or not; if they chose to attend, what contributions to make; and to be adequately prepared towards it. Furthermore,

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[3] *Supra*.

if they chose not to attend, whether to appoint a proxy to attend on their behalf to enable them exercise their corporate franchise.

The general practice of public companies is to incorporate the Notice of Meetings in the Statement of Affairs of the companies and send them in a booklet form to the members. In the same booklet, the companies' goods and services; and the management structure are displayed. Thus, becoming a veritable advertisement medium for some companies. The Notice further gives an indication of the companies' compliance with a statutory corporate requirement[4]. It also creates awareness of the existence of the companies to enable the general public, competitors, Government and relevant authorities monitor their activities for purposes of investment policy formulation and regulations.

Notice of meetings is predicated on prior board authorization, failing which, it is invalid. In a decided case, requisition was sent to the directors requesting the convening of an extra - ordinary general meeting to pass a resolution for voluntary winding up of the company. Without any resolution of the board authorizing the calling of the meeting, the secretary proceeded to summon the meeting. At the meeting, the resolution was passed by the required majority. At the hearing of a petition by a creditor that a compulsory winding up of the company, the company contended that a voluntary liquidation was pending and the creditor had not shown any prejudice to it. The validity of the voluntary winding up was challenged on the ground that the meeting was held without the authority of the board. The court held that the secretary had no authority to call the meeting, and accordingly, the court made an order for compulsory winding up of the company on the petition of the creditor[5].

The consent of the Directors separately obtained by the secretary is not a substitute for a board resolution[6]. However, such defective Notice may be cured by subsequent ratification by the board[7]. Where the authorization emanates from a board meeting irregularly constituted, the meeting so summoned will itself be irregular and its proceedings ineffectual. This defect must be raised timeously.

Contents of notice of Meetings.

The general contents of a Notice of meeting are provided for in Section 218 of CAMA.

(1) The notice of meeting shall specify the place, date, and time of the meeting, and the general nature of the business to be transacted thereat in sufficient detail to enable those to whom it is given to decide whether to attend or not, and where the meeting is to consider a special resolution shall set out the terms of the resolution.

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[4] Section 218(3) CAMA, which provides that no business may be transacted at any general meeting unless notice of it has been duly given.

[5] *In Re State of Wyoming Syndicate*, [1901] 2Ch 43.

[6] *Re Haycraft Gold Reductions and Mining Company* [1900] 2Ch. 230.

[7] *Hooper v. Kerr St Art & Co.* (1900) 83 LT 729.

The Notice must be headed in the name of the company. It must state the particular kind of meeting that is intended to convene[8]. The notice must give a fair, candid, and reasonable explanation of the business to be transacted at the meeting[9]. This will afford persons wishing to attend a reasonable opportunity of being present[10]. The notice of the meeting must be in writing, specifying the place, date and time of the meeting and the general nature of the business to be transacted thereat in sufficient details. This will enable the recipients make up their minds.

A notice must be absolute and not contingent or conditional. The holding of the meeting shall not depend on the happening of some uncertain events or the fulfillment of some undetermined condition[11]. Nonetheless, it will not be out of place for a notice to stipulate that certain business will be considered only in certain situation, so long as the terms of the notice are unequivocal as to the actual holding of the meeting itself, the notice is not vitiated[12].

The contents of the notice must anticipate the nature of the proceedings and the business actually transacted at the meeting must substantially correspond to what was notified. Accordingly, where a notice states that two related resolutions are to be proposed, and at the meeting, only one is put to the meeting. The passing of the one resolution will be ineffectual as it resulted from a fundamentally different position from that contemplated by the notice[13]. If a notice, however, specifies properly only a part of the business it proposes to transact, that which has been properly notified, is within the competence of the meeting[14]. Amendments which are relative to, and arise fairly out of a proposed resolution may be dealt with notwithstanding that notice of the amendment has not been previously given[15].

A notice of meeting should not be construed with excessive rigidity provided it complies with CAMA, the articles of association and conveys in clear terms the nature of the business to be transacted at the meeting. *A fortiori* the notice must adequately disclose all material facts relevant to the meeting, which the members will be called upon to deliberate at the meeting. The import of this is that it will enable those receiving the notice to ascertain whether attending the meeting will better serve their interest or otherwise[16].

In any case, whether a notice of meeting is adequate or not depends on the facts and circumstances of each case. In *Kay v. Kroydon Tramways*[17], a notice which failed to disclose the pecuniary interest of directors in a proposed reconstruction was held to be bad. Conversely, a resolution increasing the fees payable to directors was regarded valid even though the notice specified a greater increase than was actually resolved[18].

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[8] *Gardner v. Iredale* (1912) 1 Ch. 700

[9] *Kaye v. Croydon Tramways* (1898)

[10] *Smith v. Darley* (1849) 2 H. L. Cas 789; *Merchant of the Staple v. Bank of England* (1887) 21 QBD 160.

[11] *Alexander v. Simpson* (1889) 43 Ch. D 139.

[12] *Epsuela Land Co* (1900) W.N. 139.

[13] *Re Teed and Bishop* (1901) 70 LT (C11) 407.

[14] *Re British Sugar Refining Co.* (1857) 3 K & J. 408.

[15] *Re Trench Tubeless Tyre Co* (1900)

[16] *Hughus v. Union Cold Storage Co* (1934) 78 SJ 551.

[17] (*supra*); see also *Hutton v. West Cork Railway Co.* (1883) Ch.D 654.

[18] *Torbok v. Lord Westbury* (1902) 2 Ch 871.

A notice generally, must give a broad nature of the business to be transacted at the meeting. Where a meeting is to consider a special resolution, the notice shall set out the clear and unambiguous terms of the resolution. In the case of an annual general meeting, a statement that the purpose of the meeting is to transact the ordinary business of an annual general meeting is sufficient specification that the business is for the declaration of dividends, presentation of the financial statements, reports of the directors and auditors, the election of directors in place of those retiring and the fixing of the remuneration of the auditors[19]. It suffices if the notice makes a plain and reasonable provision of what is to be done without necessarily specifying the nitty-gritty or section of the Act concerned[20].

The notice must clearly remind the shareholders of their rights to appoint proxies if they chose not to personally attend the meeting. It must be dated and the company's registered address indicated. The authorizing body must be indicated and endorsed by the secretary.

Notices must be served, either personally or by sending it to the members entitled to it by registered post to their registered addresses[21]. It is humbly submitted that service by post should include service by recorded delivery service or registered post, e-mail and other electronic delivery systems. Where the notice is sent by post, service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice at the expiration of seven days after posting[22]. It behooves the members to ensure the currency of their addresses in the register of members. It is gratifying to mention here that the issue of delayed postages will no longer arise with the availability of e - mails and bulk s. m. s.

A notice of meeting may be given to joint holders of a share by giving the notice to the joint holder first named in the register of members in respect of the share. Similarly, it may also be given to the persons entitled to a share in consequence of demise or bankruptcy of a member. CAMA makes it mandatory to give notice of meetings to members outside the country provided they furnished their address for service. It is also compulsory to give to known representatives of deceased shareholders prior to the transmission of the shares of the deceased members to them[23]. This is in contradiction to the Common Law rule that the company has no obligation to give notice to members outside the country or to the representatives of deceased members whose names have not been entered in the register of members[24].

The registered address of members will be the address in the register of members which Section 83 CAMA requires every company to keep at its

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[19] Section 218(2) CAMA.
[20] *Imperial Bank of China v. Bank of Hindustan* (1886) L. R. 6 E.Q. 91.
[21] Section 220(1) CAMA.
[22] Section 220 (2) CAMA.
[23] Section 220(1) & (4) CAMA.
[24] *Re Warden v. Hotch Kiss Ltd* (1945) Ch 270; *Allen v. Gold Reefs of West Africa* (1900) 1 Ch 11.

registered office. Until the register is fully made up, the address on Forms CAC 2 & 2A (Statement of Share Capital and Return of Allotment (Pre - Incorporation); and Return of Allotment (Post Incorporation) may be used[25].

Additionally, public companies are required to advertise the notice of meeting in at least two national dailies twenty one days before the general meeting[26]. It is worthy to mention that the advertisement aforesaid does not in any way relieve the company of the obligation to give notice to the members personally, by post or e - mail. Nonetheless, it is not incumbent on the company to establish that the advertisement actually got to the notice of the persons for whom it was published[27]. Where a meeting is adjourned for thirty days or more, notice of the adjourned meeting shall be given as in the original meeting[28].

Pursuant to Section 235 CAMA, desiring members of the company may require the company to give notice of a proposed resolution to be passed at an impending meeting. A member(s) representing not less than one - twentieth of the total voting rights of all the members or at least one hundred members holding shares in the company on which there has been paid an average sum of not less than N500.00 per member can make the requisition. It shall be the duty of the company on requisition, in writing, duly signed by the requisitionists and at the company's expense give the members notice of any resolution which may be moved and is intended to be moved at the next meeting of the company. The company may also be requested to circulate to members any statement with respect to any matter referred to in any proposed resolution. Such statement must not exceed 1,000 words, otherwise the company may circulate a summary of it. The notice of the resolution shall be given at the same time with the notice of meeting or as soon as practicable. The company shall not be bound to give notice of any resolution or to circulate any statement unless a copy of the requisition requiring any notice of a resolution is deposited at the registered office of the company at least six weeks before the meeting. In the case of any other requisition, the notice will be deposited at least one week before the meeting. The company shall not be bound to give notice of any resolution, or circulate any statement, unless there is deposited or tendered with the requisition, a sum reasonably sufficient to meet the company's expenses in carrying this out.

Who are the persons entitled to Notice of Meetings?

Pursuant to Section 219 (1) CAMA, it is mandatory to give notice of general meetings to every member of the company *ex debito justicae*; every person upon whom the ownership of a share devolves by reason of

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[25] Sections 35 & 29 CAMA.

[26] Section 222 CAMA.

[27] *Sneath v. Valley Cold Co.* (1893) 1 Ch. 44.

[28] Section 239(2) CAMA.

his being a legal representative, receiver or a trustee in bankruptcy of a member; every director of the company; every auditor for the time being of the company and the company secretary.

In the case of Board of Directors meetings, only the directors on the board of the company are entitled to receive notice. A director who is outside the country and has not furnished an address within Nigeria need not be given notice[29]. Failure to give fourteen days notice in writing to all directors entitled to receive notice unless otherwise provided by the articles invalidates the meeting. In *Bernard Longe v. First Bank of Nigeria PLC*[30], the appellant was the plaintiff at the Federal High Court, Lagos, where on July 4, 2002; he issued a writ of summons against the respondent as the defendant claiming *inter alia*;

(1) A declaration that the defendant's Board of Directors cannot lawfully hold any meeting of the said Board without giving notice thereof to the plaintiff and accordingly all decisions taken at any such meetings is unlawful, invalid, null and void and incapable of having any legal consequence;

(2) A declaration that in particular the decision of the defendant's Board of Directors held on the 13th of June, 2002 to revoke the plaintiff's appointment as Managing Director/Chief Executive is wrongful, unlawful, invalid, null and void and incapable of having any legal consequence...

The Supreme Court in allowing the appeal held *inter alia* that;

> The removal of the plaintiff as Managing Director/Chief Executive of the defendant without a notice to him to attend the meeting at which the decision was taken is a clear violation of Section 266(1) and (2) of the Companies and Allied Matters Act, and such violation must attract the penalty prescribed by law under Section 266(3). The said meeting is under the law invalid and the removal of the plaintiff is not in accordance with law[31].

Where a director purportedly professes to waive his right to be sent notice of meeting, the omission to give the notice to the director invalidates the proceedings at the meeting. In *Young v. Ladies Imperial Club*[32], notice of Board meeting was not sent to certain directors who had earlier stated that they would not attend. The court held the resolution passed at the meeting to be null and void. The *raison d'être* is that participants cannot waive their rights to notice of meetings convened for the discharge of legal duties. Creditors and employees are *ipso facto* entitled to notice of meetings.

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[29] Section 266 (4) CAMA
[30] (2010) 6 NWLR (Pt. 1197) 1
[31] Ibid @ per George Oguntade, JSC.
[32] (1920) 2 KB 523.

Types of notices

Notices may be classified into ordinary, special and default notices. Ordinary notice is the usual and conventional notice applicable to all general meetings which shall be given by the company to the members at least twenty one days before the meeting[33]. For Board meetings, the period of the notice is subject to the articles of the company, fourteen days before the day of the meeting[34]. In the case of debenture holders, the period of notice shall be stated in the trust deed or debenture. The period of notice required at creditors voluntary winding up meeting will be published in the gazette and at least two national dailies circulating in the area where the registered office of the company is situated. For creditors meeting at winding up subject to the Companies Winding up Rules, the official liquidator or the liquidator shall give not less than fifteen days notice to be published in the gazette and a local newspaper[35]. Special Notice by its peculiar nature is required to be given by the members of the company for a period not less than twenty eight days before the day of the meeting[36]. The company, on receipt of the special notice from a member, will in turn give ordinary notice of the intention to propose the resolution concerned at the meeting of the company. Notice of meeting to remove a director, elect as a director in a public company a person above the age of seventy years; or to remove or appoint an auditor of a company must be by special notice.

Default notice[37] is one which falls short of the period required for it. It is however, validated by those entitled to allege its invalidity. With respect to annual general meetings, a meeting can be validly convened even when the period of notice given falls short of twenty one days, if it is so agreed by the members entitled to attend and vote at the meeting. For any other general meeting, the majority of members holding not less than ninety five per cent in the nominal value of the shares giving rights to attend and vote at the meeting or in the case of a company not having a share capital ninety five per cent of the total voting rights at that meeting of all the members.

Furthermore, where the intention to move a resolution requiring special notice has been given to the company and a meeting is called for a period of twenty eight days or less after the notice has been given, the notice though not given within the required time shall be deemed to have properly given.

Default in giving Notice of Meeting

Notice of meeting is akin to hearing notice. It is to meetings as hearing notice is to litigation. The essence of hearing notice is to give a party to a suit an opportunity to be heard before the matter is decided one way or the other. Where hearing notice is denied a party entitled to it, it amounts to a breach of fair hearing. Fair hearing is a fundamental principle of the administration of justice that no decision can be regarded as valid unless

[33] Section 217 (1) CAMA.
[34] Section 266(2) CAMA.
[35] Rule 112, Companies Winding Up Rules, CAP. C20 Laws of the Federation of Nigeria, 2004.
[36] Section 236 CAMA.
[37] Section 217 (2) CAMA.

the trial court has heard both sides in the conflict[38]. Service of hearing notice is one way of guaranteeing a party fair hearing. *A fortiori*, notice of meeting if denied a person entitled to it has robbed him of his franchise, and no valid resolution can be reached at such meeting.

It is trite that in any group of persons, the minority has no power to bind the majority save and except that power is conferred by statute, charter or conceded by contract. A corollary to the foregoing is that if a part is to bind the whole, the regulations conferring power to do so must strictly be adhered to. Majority rule is the norm in corporate democracy. Minorities are allowed to have their say whilst the majority will always have their way, which represents the will of the company and binds all. Thus, in corporate governance, at company meetings in particular, part of the members may bind the whole, if *inter alia* notice of the meeting is served on all members, failing which attracts serious consequences.

In companies practice therefore, it is compulsory to give notice of company meetings to those entitled to it. The right to vote is concomitant to beneficial ownership of shares, and so is the right to complain of non receipt of notices. The law is settled that every one entitled to be present at a meeting must be given notice of meeting. Failure to give notice, even to an individual entitled to receive the notice invalidates the meeting[39]. In order to mitigate the harshness of the law in this regard, it became the practice of companies to insert in their articles of association saving clauses like: "the non receipt of the notice by any member shall not invalidate the proceedings at any general meeting." The obvious effect of this kind of provision is to gag an aggrieved member and exclude his right to complain of the non receipt of the notice. With the greatest humility, we submit that this will not provide the much needed shield for any defaulting company where a notice was not sent at all. More so, the articles of association of a company shall be made subject to the enabling statute and not used to legislate out of existence the express provisions of the statute.

The default of notice of meetings can be categorized into three, viz: where the notice is not sent to the person entitled to receive it; where it is sent without authorization and is subsequently ratified; and where it fails to sufficiently indicate the business to be transacted. In the first two cases, any proceeding pursuant to the notice will be invalid in its entirety, whereas in the third case, it is only the business that was not duly and properly notified that will be invalidated without more. It is worthy to note that it is not in all cases of failure to give notice that will invalidate the meeting and nullify the proceedings.

Pursuant to Section 221 of CAMA, where the failure was due to accidental omission, the inadvertence will not invalidate the meeting. In *Re West Canada Collieries Limited*[40] there was an omission to send notices to

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[38] *Victino Fixed Odds Limited v. Joseph Ojo & 2 Ors.* (2010) 8 NWLR (Pt. 1197) 486 @ 500 para.G.
[39] See *Bernard Longe v. First Bank of Nigeria Plc* (*supra*); *Onwuka v. Taymani* (1988) ALR (COMM) 313.
[40] (1962) Ch 370.

nine shareholders because their address plates had been kept out of the addressograph due to non delivery and return of previous correspondence to them by the post. For fear of their mails falling into wrong hands, their address plates were kept out of the machine. The court held that the omission was accidental and did not invalidate the meeting.

Conversely, failure to give notice as a result of misrepresentation, misinterpretation or ignorance of the law or the provisions of the articles of association is not tantamount to accidental omission[41]. In a decided case, the plaintiffs transferred their shares but their names remained in the register of members because of outstanding sum in the value of the shares. The general meeting of the company was held without notice to the plaintiffs, under the erroneous impression that having executed transfers of their shares, the plaintiffs were no longer members of the company and as such not entitled to notice of meetings. The court held that the omission was not accidental, and the failure occasioned by not giving the notice was fatal and invalidated the meeting[42].

A member present at the meeting not properly convened or constituted and who takes no steps to impeach the meeting within a reasonable time, may be precluded from setting up the irregularity subsequently[43].

Remedies for default in giving notice.

There are two legal remedies available which may be resorted to where there is default in giving notice of meetings to those entitled to receive them:

1. Where the meeting is proposed, the aggrieved member(s) can apply to the Federal High Court[44] for order of injunction restraining the company from convening and holding the meeting.

2. Where the meeting has been convened and held, the aggrieved member(s) can apply to the Federal High Court for a declarative order that the meeting is invalid and decisions taken thereat are null and void; and for an order to set aside the entire proceedings.

Conclusion

What is worth doing is worth doing well. For company meetings to merit their pride of place in the grand scheme of things in modern day corporate governance, for it to be worthy of the huge resources the company expends to convene and hold the meetings; the invaluable time and hard earned pecuniary resources the members spend to attend the meetings, it must be properly convened and held. To achieve this purpose, the members must as a matter of paramount importance be properly invited to enable them attend, and must be properly informed on what to expect at the meeting to enable them adequately prepare in order to contribute meaningfully to the deliberations at the meeting. And where proxies are to appointed, they should be adequately briefed and well educated to ably participate at the meeting proceedings.

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[41] Section 221 (2) CAMA.

[42] *Musselwhite v. C.H Musselwhite & Son Ltd* (1962) Ch 964.

[43] *Re British Sugar Refining Co* (*supra*).

[44] Section 251(1) (e)Constitution of the Federal Republic of Nigeria 1999; Rule 2(1) Companies Proceedings Rule 1992.