



# **An Overview on the Conceptual Origin of the Doctrine of Constructive Notice as Applicable to Corporate Law in Nigeria**

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## **ABSTRACT**

This paper focused on the Overview on the Conceptual Origin of the Doctrine of Constructive Notice as Applicable to Corporate Law Nigerian. The paper mainly aimed at identifying the conceptual origin, codification and application of the Doctrine of Constructive Notice, to companies within and outside Nigerian Corporate Law. The methodology adopted in this paper is doctrinal method in which primary and secondary sources forming part of the related literature are used. The primary sources are mainly statutory provisions while the secondary sources include legal opinions from legal text writers and judicial interpretations. The paper recommends expunging.

**Keywords:** Conceptual Origin, Doctrine of Constructive Notice, Applicable, Corporate Law Nigeria

## **1.1 INTRODUCTION**

The doctrine of constructive notice is a legally recognized principle which in effect means that a person is presumed to have known the existence of certain facts or contents of documents, though personal knowledge, delivery or service thereof has not actually taken place. The idea of constructive notice came up for consideration and was adopted in Continental Europe which was subsequently extended to English land law essentially to avoid fraud in land matters. Consequently, the idea of constructive notice was borrowed and applied in judicial matters and subsequently to corporate matters. As a result of British incursion, this common law principle was applied in Nigerian corporate matters until enactment of Companies and Allied Matters Act that abolished the doctrine in relation to memorandum of association, articles of association while allowing the doctrine to apply to matters relating to debentures, shares, particulars of directors and so forth.<sup>1</sup>

## **1.2 Historical Origin of the Doctrine of Constructive Notice**

Originally, apart from the doctrine of constructive notice known to corporate matters, the doctrine had since, been applicable to matters relating to title to land, service of courts processes or legal notices.<sup>2</sup> The idea of constructive notice was initially known to the Roman Empire even before Common Law principles were developed. The practice was adopted in Continental Europe upon Roman occupation until subsequent adoption of the Statute of Fraud of 1677. The doctrine was hitherto applicable to land matters only whereby transfer of legal title to land ranked in priority.<sup>3</sup>

In England, transfer of title is witnessed by a symbolic ceremony known as "delivery of *seisin*."<sup>4</sup>

<sup>1</sup> Section 68 of the Companies and Allied Matters Act, 1990, (as amended).

<sup>2</sup> Joseph R. L., "Notice in Equity", Vol. 34, No. 2 9 *Harvard Law Review* 1920, pp. 137-160; also available at <http://www.jstor.org/stable> Accessed: 17/02/2017.

<sup>3</sup> George A. S., "Constructive Notice (A Multi-State Perspective)" a lecture delivered at the 20<sup>th</sup> Annual Advanced Oil, Gas & Energy Resources, Institute for Energy Law, Houston, 2013, p. 1.

<sup>4</sup> *Ibid*.

The transfer of possession in this sense served as a notice to the public of the new title holder. Later, a written deed with full description of the land granted accompanied the delivery of seisin that served as evidence of title and not a conveyance itself. The deed is considered public document hence, members of the public are having constructive notice of the contents.<sup>5</sup>

In corporate matters, the doctrine of constructive notice first came to light when the United Kingdom Parliament moved to promote business efficacy and to curtail fraudulent activities on companies, enacted corporate laws<sup>6</sup> to regulate Joint Stock Companies.<sup>7</sup> The 1844 Act established office of the Registrar of Joint Stock Companies. Companies were consequently required to be incorporated and have their deeds of settlement (now memorandum and articles of association) filed with the Registrar that were made accessible to members of public, hence, public documents.<sup>8</sup> In 1855, the parliament however renamed the 1844 Act and enacted Limited Liability Act. The Act maintained the hitherto position of 1844 Act as regard doctrine of constructive notice. The Act was subsequently replaced by Joint Stock Act of 1856 which also mandated companies to file their Deeds of Settlement and annual returns and were accordingly considered public documents and therefore a deemed notice to the whole world. This however, does not cover documents relating to financial and other sensitive information that are disclosed essentially to assist a member or shareholder to make an informed judgment.<sup>9</sup> Furthermore, such person is also deemed to have understood the provisions of these documents.<sup>10</sup>

The legitimacy of the doctrine of constructive notice was judicially approved in the case of *Ernest v Nicholls*,<sup>11</sup> where the deed of settlement of the defendant company provided that where there is any contract or dealings with third parties by which any director is interested, then such contract or dealing shall be set as agenda for the next company's general meeting in which shareholders shall be summoned and consented to. Furthermore, the company or its agents shall not enter into any contract without approval of at least three directors (other than the director who is a party to the transaction sought to be approved) of the Board or by the approval of majority of votes of the shareholders present at the meeting. In the instant case, three directors of the board, including the interested director, approved the transaction sealed and signed by two directors. It was held that the plaintiff has no remedy in law or in equity as the transaction is beyond the powers of the directors. By the provision of Joint Stock Companies Act, persons dealing with companies ought to look at the deed and the Act of Parliament by which the entire world should have notice of its existence.

Obviously, Nigerian corporate law is to some extent, a product of the English company law. In the pre-colonial era, the concept of modern corporate laws as at today was not known to hitherto Nigerian societies. The existing corporate laws were largely derived from English Law upon the advent of colonial rule. The English corporate law includes doctrine of constructive notice, was introduced to Nigeria by the British colonial rulers in 1876.<sup>12</sup>

In 1922 the colonial administration introduced Companies Ordinance of 1922 by which doctrine of constructive notice was still in operation. The 1922 Ordinance was amended by the Companies (Amendment) Ordinance of 1929 which was also amended by the Companies (Amendment) Ordinance 1941. The 1941 Ordinance was further amended by 1954 Ordinance. The 1968 Companies Act also maintained application of the doctrine of constructive notice, making the doctrine as part of Nigerian law.

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<sup>5</sup> Ibid.

<sup>6</sup> Joint Stock Companies Registration and Regulation Act of 1844, available at [www.legislation.gov.uk](http://www.legislation.gov.uk). Accessed on 8/2/2017.

<sup>7</sup> Maltby, J. "UK Joint Stock Companies Legislation 1844-1990; Accounting Publicity and Mercantile Caution", NS Vol. 3, No.1 1998, p. 11. Available at <https://www.google.com.ng>. Accessed on 2/1/2017.

<sup>8</sup> Joint Stock Companies Registration and Regulation Act of 1844.

<sup>9</sup> Articles VII and VIII Victoria Cap. 110, s. 7, Joint Stock Companies Registration and Regulation Act.

<sup>10</sup> Ibid.

<sup>11</sup> (1857) 6 H Cas 401; John Dewey, "The Historical Background of Corporate Legal Personality," *Yale Law Journal*, Vol. XXXV, 1926, pp. 655-673. Available at <https://www.google.com.ng>. Accessed on 2/6/2017.

<sup>12</sup> Obilade, A. O. *The Nigerian Legal System*, Spectrum Books Limited, Ibadan, 2007, P. 69.

However, Nigerian legislation replaced the 1968 Act with Companies and Allied Matters Act (CAMA) Decree No. 1, Laws of the Federation of Nigeria, 1990<sup>13</sup> which drew inspiration largely from the applicable principles of company law in the United Kingdom.<sup>14</sup>

### **1.3 Nature of Constructive Notice**

There are divergent views particularly among judicial officers on the term notice in relation to statutes whether the term includes constructive notice. This is predicated on the fact that statutes have not defined it nor was there any indication pointing out that the word “notices” covers constructive notice. In England for instance, some have taken the view that the term notice only refers to actual notice while others have taken the contrary view. Accordingly, Kerr<sup>15</sup> is of the view that logically unless a statute specifically mentions constructive notice, the term notice refers to express or actual notice.

Dymond however is of the view that constructive notice is derivative of the term notice and therefore notice ought to be construed to include constructive notice.<sup>16</sup>

Notice refers to perceiving of a fact by way of knowledge, acquaintance or mindfulness. Putting one on notice of a fact is to bring that fact to his knowledge through one of his senses. If the information sought to be conveyed is directly delivered to a party, the notice is said to be actual or express notice and can easily be proved by evidence.<sup>17</sup> As opposed to actual notice, constructive or imputed notice presupposes legal presumption that a person is aware as to existence of particular facts notwithstanding that none of his senses perceived existence of these facts.<sup>18</sup> It follows therefore that in the absence of actual or express notice, the law imputes knowledge of such facts to a person and this is what is called constructive notice. Constructive notice presupposes knowledge of a fact to a person inferred from circumstances of a particular case. The doctrine had its roots in equity and was often defined in some cases to accommodate constructive notice.<sup>19</sup>

Under corporate law, persons dealing with a company are taken not only to have read certain category of documents that are legally considered public documents but rather they are taken to have understood them according to their ordinary and correct meaning.<sup>20</sup>

The Common Law doctrine of constructive notice applies to the form which contains particulars of directors and secretary who are in charge of the company management. It is a document which affects powers of the company and its agents. Therefore, persons dealing with a company should enquire about its principal officers at the Registrar of Companies’ office.<sup>21</sup>

Legally, everyone who deals with a company in a manner inconsistent with the contents of memorandum and articles of association does so at his own peril and the consequences shall be borne by him alone.

Constructive notice refers to those things assumed or inferred by the law as induced within the context of its applications or legal document<sup>22</sup> or facts inferred rather than directly expressed.<sup>23</sup> It also refers to a fiction that a person is deemed to have gotten notice of a particular fact even though actual notice was not personally delivered to him/her. For instance, a law may provide that a public notice be put on the courthouse or notice board as a substitute for actual notice.<sup>24</sup>

<sup>13</sup> (as amended).

<sup>14</sup> Duru, O. “To what extent is the Nigerian Company Law a product of English Company Law,” Available at <http://www.google.com.ng/legalempers.com>. Accessed on 24<sup>th</sup> April, 2016.

<sup>15</sup> Ker, W. W., *Kerr on the Law of Fraud and Mistake*, 7<sup>th</sup> Edition, Sweet & Maxwell, London, 1952, p. 250.

<sup>16</sup> Dymond, R., *Dymond’s Death Duties*, 15<sup>th</sup> Edition, Oyez Publishers, London, 1973, p. 652.

<sup>17</sup> *Allen v. Seckham* (1879) 11 Ch.D.

<sup>18</sup> *Ibid.*

<sup>19</sup> Kodilinye, G., *An Introduction to Equity in Nigeria*, Spectrum Books Limited, Ibadan, 2007, p. 33.

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

<sup>21</sup> *Oakbank Oil Co. v Crum* (1882) 8 A.C. 65.

<sup>22</sup> Walker, A., *The New International Webster’s Comprehensive Dictionary of English Language*, Standard International Media Holdings, Texas, 2013, p. 280.

<sup>23</sup> Robinson, M., *Chambers 21<sup>st</sup> Century Dictionary*, Harrap publishers Ltd., New Delhi, 2006, P. 294.

<sup>24</sup> *Raymond, W.*, “*2 Oxford University Press*, 2012. Accessed on 28/4/2017.

Constructive notice refers to such notice that is implied or imputed by law on the basis that registered information is a part of a public record or file, particularly if they are kept in documents and been recorded in the appropriate registry of deeds or probate. A person is presumed aware of its contents by reason of the notorious nature of the thing to be noticed as opposed to actual notice of such thing.<sup>25</sup>

The law in this regard looks at it as sufficient notice to the person concerned.<sup>26</sup>

In United Kingdom, the law<sup>27</sup> gives room for documents kept by the Registrar of Companies to be inspected on application by public. This is known as doctrine of constructive notice.<sup>28</sup>

The doctrine was briefly laid down in the case of *Mahony v East Holyford Mining Co.*<sup>29</sup> where it was held that whether a person has actually reads those public documents or not, it will be presumed that he has read them. Every stock joint has its memorandum and articles of association open to all who are minded to have any dealings whatsoever with the company and those who so deal with them must be affected with notice of all that is contained in these two documents.

#### **1.4 The Concept of Constructive Notice under Nigerian Corporate Law**

Application of the doctrine of constructive notice to Nigerian corporate law had direct link with the received English Common Law that was incorporated as part of its (Nigerian) laws. Section 14 of the Supreme Court Ordinance 1876 provides that rules of Common Law, doctrines of Equity and statute of general application that were in force in England before 1<sup>st</sup> January 1900 shall be in force in what is known today as Nigeria. Corporate matters which also include principles of constructive notice among others were regulated by the Ordinance.

The doctrine of constructive notice continued in its full force under Companies Ordinance of 1922 and maintained by Companies Act of 1968 respectively until subsequent promulgation of Companies and Allied Matters Decree in 1990 whereby the doctrine becomes applicable by virtue of sections 197 and 68<sup>30</sup>

Section 197 (1) on the other hand enjoins the Registrar of Companies to register and allow public access in respect specified particulars of charges delivered to him by the company. The particulars are listed under subsection (2) of section 197.<sup>31</sup> The charges are registered in the register of charges<sup>32</sup> where inspection by public would be allowed.<sup>33</sup> The registered charges accordingly impute notice constructively to any subsequent person intending to deal with the company on that particular asset.<sup>34</sup> This position is however concurrent with the recent decision of the court in the case of *Betracco Ltd. v Spring Bank Ltd*<sup>35</sup>

#### **1.5 CONCLUSION**

We have appreciated how constructive notice was first established by legislation and applied in corporate matters. These legislative efforts, though achieved the goals to some extent, they however lost the primary intention when companies turned the doctrine as machinery for fraud. This is because a third party has no access to company's internal formalities yet he would be made to suffer consequences of the companies' actions.

<sup>25</sup> Black, M. A., *Black's Law Dictionary*, 6<sup>th</sup> Edition, St. Paul, Minn., West Publishing Co., 1990, p. 313.

<sup>26</sup> Stewart, W.J., *Collins Dictionary of Law*, Glasgow, 2006, available at <http://www.google.com.ng>. Accessed on 28/4/2017.

<sup>27</sup> Section 610 of the Companies Act, 1956 United Kingdom, available at <http://www.google.com.ng>. Accessed on 28/4/2017.

<sup>28</sup> *Allen v. Seckham* (1879) 11 Ch.D.

<sup>29</sup> (1875) LR. 7 HL 869.

<sup>30</sup> Companies and Allied Matters Act, 1990 (as amended).

<sup>31</sup> Emiola, A., *Nigerian Company Law*, 2<sup>nd</sup> Edition, Emiola Publishers, Ogbomosho, 2007, p. 236 .

<sup>32</sup> *Ibid*, p. 248.

<sup>33</sup> Pennington, R., *Company Law*, 4<sup>th</sup> Edition, Butterworths, London, 1979, p. 443.

<sup>34</sup> Section 207(1) of CAMA.

<sup>35</sup> (2015) 5 NWLR (Pt. 1451) p. 107 at 111.

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