

**PROMOTERS OF COMPANIES AS NECESSARY EVIL IN THE ECONOMIC LIFE  
OF A NATION\***

**Abstract**

For centuries a group of people in different forms have been in the business of creating artificial persons through the instrumentality of the law and using the persons so created to affect the life of individuals and by extension the nation economically. They bring people and resources together and breath life into them to carry on business with the aim of making profit mainly and at the same time reduce if not eliminate the problems associated with unlimited liability . This group of people are called promoters. In recent times due to a few incidents these group have been seen as part of the problems of the society rather than the solution, particularly in Nigeria where corruption has eaten deep into the bone marrow of her leaders and the led. This paper is an attempt at examining the meaning, history, the legal framework, *modus oparandi*, duties, liabilities of promoters in the light of emerging trends that suggest fraud on the part of the investors. Finally the role they play in the economic life of a nation with particular reference to Nigeria was considered.

The term “Company” by itself is not capable of strict legal definition. Even section 650 of our companies and allied Matters Act (CAMA) did not help matters as it made little or no attempt to define the term “Company”. According to it

Company or existing company” means a company formed and registered under the Act or, as the case may be formed and registered in Nigeria before and in existence on the commencement of this Act.

So what is a Company? I will not attempt to answer the question in this paper except to state that the term has been of common use over centuries to describe any Association or a body of a substantial number of persons natured or artificial formed to carry on business for purposes of gain. But this meaning would apply equally to partnership which in law is constituted very differently from a Company. All the same Companies constitute an essential feature of a country’s economy. Their importance can be assessed from their number hundreds of thousands, in Nigeria for instance. I shall avoid going into when a Company, strictly speaking comes into being. i.e whether before or after incorporation?

This paper shall attempt an examination of those who bring these companies into existence called “Promoters.”

The promotion of a Company means the process by which a Company is Incorporated by registration under the Companies Act, and “FLOATED” or established financially as a going

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concern.<sup>1</sup> Who engage in the bringing into being of a Company are referred to as promoters. The task of promoting or forming and incorporating a Company is not an easy one, there are professional promoters, however any person having good ideas may promote a company. Oxford English Dictionary<sup>2</sup> defines a promoter as

“One who promotes, or takes the requisite steps in the formation of a Company. One who is a party to the preparation or issue of prospectus.”

Black Law Dictionary<sup>3</sup> defines a promoter as “one who promotes, urges on, encourages, incites, advances etc. The persons who, for themselves or others take the preliminary steps to the founding or organization of a corporation or other venture. Those persons who first associate themselves together for the purpose of organizing the company, issuing its prospectus, procuring subscription to the stock, securing a charter”etc.

It does appear that promoters have not much recorded history as all attempts to find how and when promotion of companies started proved abortive. However from pieces of history it appears that because of the method of obtaining incorporation in the early days in England which was by the Royal Charter and Act of Parliament only and the difficulty involved, many companies were formed without incorporation by their members simply executing deeds of settlement containing provisions similar to those found in charters of incorporation.

The other method was referred to be PENNINGTON<sup>4</sup>. i.e “Second Hand” and involved the purchase of Charters of Moribund Companies which have been incorporated by the Crown. In 1720, rather than solve those and related problems, the parliament in England, through the BUBBLES ACT. Come down heavily on promoters of Companies in the following words:-

“Promoters of companies had raised large sums of money by inviting the public to subscribe for Shares that subscribers had presumed to act as corporations by pretending that their shares were transferable.”

The above indictment gave rise to legislation that tended to check the activities of promoters. It also gave the impression that promoters were evil in the economic life of the nation then. Whether this is true today is the question we will attempt to provide an answer in this paper.

The courts have carefully refused to lay down any formal definition of the term “Promoter”. The reason may be that promoter, though not strictly a trustee, stands in a Fiduciary position or relationship towards the intended company and its prospective shareholders, therefore if a formal definition were laid down, it might be possible for persons concerned in the promotion of the companies to keep outside the limits of the strict legal definition and to take advantage of their fiduciary position without incurring any liability as “promoters”.

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<sup>1</sup>Company Law, eleventh Edition (1976) Cassel & Coy Ltd London.

<sup>2</sup>Adeniji vs starcola Ltd. (1984) 7 S. C. 119, Okafor V Ezenwa (1992) 4 NWLR (Part237) 611 662E.

<sup>3</sup>Second Edition page 11456 , Sixth Edition page 1214

<sup>4</sup>Company Law, 3<sup>rd</sup> Edition London Butterworths (1973) p.6

In general however, a promoter may be described as:

“one who undertakes to form a company with reference to a given Project and to set it going, and who takes the necessary steps to accomplish that purpose”

The point should be made clear here that whether a person is a promoter or not depends on the facts in each particular case. Once the primary responsibility has been assumed or appears to have been assumed even for a part only of the formation or floatation of a company, it will be difficult to evade the obligations or liabilities of a promoter even though attempts may be made to act through nominees while remaining on the background.

S.61 of the Companies and Allied Matters Act (CAMA 1990) defines a promoter thus

“Any person who undertakes to take part in forming a Company with reference to a given project and to set it going and who with regard to proposed or newly formed company undertakes a part in raising capital for it, shall prima facie be deemed a promoter of the Company.”

However the section exempted some persons when it went further to state that provided that a person acting in a professional capacity in the formation of the company is not deemed to be a promoter e.g Lawyers and Accountants see *GARBA V SHEBA. INT. (Nig) Ltd (2002) 1 NWLR (Pt.748) at 372.*

From the above definition the Company must be in respect of a given project. Unless it is assumed that all the objects contained in the memorandum of Association of a company form one project then that definition may have some flaws. Again a mere undertaking of a part to raise capital not only for a proposed company but an already formed company makes one a promoter. The use of the phrase “newly formed” is not clear as the phrase is not defined in the Act. A five year old company would be newly formed.

Another important phrase in that definition is ”.....shall be prima facie deemed.....” In other words that person is on the face of it deemed to be a promoter which means he has an opportunity to explain himself out or prove the contrary. In summary the phrase creates a window.

The exception introduced by that section 61 which is copied from section 43 (5) of the Companies Act 1967 did not complete the copying because S.43 (5) protects persons acting in professional capacity from liability in respect of misrepresentation in the prospectus and not a blanket protection.

A company may have several promoters. In the Leads Theatre case <sup>5</sup> it was held that an existing Company may promote. It is also assumed that the use of the word “persons” includes artificial persons. The promotion of a Company may take different forms, for instance persons who give formal instructions for the preparation and registration of memorandum and articles of

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<sup>5</sup>(1962) 2 Ch. 809

Association are promoters.<sup>6</sup>It may also take the form of issuing of prospectus, negotiation or under writing contracts or a contract for purchase of property by the Company or procurement of capital.<sup>7</sup>

A person can become a promoter after the company is incorporated e.g by issuing a prospectus, or by procuring capital to enable the Company to carry out a preliminary agreement.A person who has taken no active part in the formation of a Company and the raising of the necessary share capital but has left it to others to get the Company on the understanding that he will profit from the operation is a promoter.<sup>8</sup>

Finally, whether a person is actually a promoter and if so, the date when he becomes and whether he is still one are questions of fact.

### **TYPES OF PROMOTERS**

A promoter may be an individual, a firm, an association of persons or Company, the promoters may be professional, occasional, financial or managing promoters.For professional promoters, they take up promotion as part of the occupation, they float new companies and dispose them off when the companies are well established and come to a position of making profit.

While occasional promoters are already engaged in some other business, but whenever they find some good opportunities they set up new companies to encase the opportunities. The last types are institutions set up by the government such as industrial finance corporations or industrial credit and investment corporations with the aim of promoting new companies. They are known as institutional promoters.

### **POSITION, DUTIES AND LIABILITIES OF PROMOTERS**

A promoter is not an agent for the Company he is forming because a Company cannot have an agent before it comes into existence. A promoter is not a trustee for the future Company also.S.62 of CAMA provides for the duties and liabilities of promoters. It is essentially fiduciary duty i.e. the duty to act with utmost good faith in the best interest of the Company. A breach of the duty will render the promoter liable at the suit of the Company.

Lord Cains<sup>9</sup>noted that promoters of a Company.

“stand in a fiduciary position; they have in their hands the creation and moulding of the company, they have the power of defining how, and when and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation.”

From the above judicial pronouncement there are two major duties of promoters.

- a. Duty to midwife the Company into a legal entity and set it on as a going concern.

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<sup>6</sup>Geoffrey Morse Company Law 12<sup>th</sup> Edition P. 115

<sup>7</sup>Ibid

<sup>8</sup>Per indly J in Tracy V Mandalay, Ply Ltd. (1952-53) 88 C. L. R. 215

<sup>9</sup>Erlangers case (1878) 3 A.C 1218

- b. Fiduciary duty to act in good faith and to ensure proper disclosure of interest in relation to the Company. No secret profit must be made out of the promotion.

It is not clear what a proper disclosure means. Gower<sup>10</sup> contends that disclosure must be made to the Company in either of the following ways:

- i. To an entirely independent board of Directors or
- ii. To the existing and potential shareholders or members by making the disclosure in a prospectus.

From the above legal position a partial disclosure to a few members only does not amount to proper disclosure. It has been argued that since in private companies the Board of Directors are usually the members of the Company, a disclosure to themselves amounts in proper disclosure in the circumstance,<sup>11</sup> however in *Glucksten v Barnes*<sup>12</sup> the court disagreed.

As to the method of disclosure Morse<sup>13</sup>. Contends that even if the disclosure is not done in a prospectus it should be done in some other way, he however fell short of suggesting the other way.

Another dimension to the issue of disclosure is that a promoter is not required to disclose only secret profit but every interest including interest in prosperity information and the like. He is liable to compensate the Company for failure to do so (S.62 (1) C.A.M.A.)

Under the companies Decree 1968 section 44 (1) @ provides for civil liability of the promoter for mis-statements in the prospectus while section 45 (!) provides for the criminal liability which carry, on conviction by the high court imprisonment for two years or fine of one hundred pounds or both. The C.A.M.A. does not have a similar provision.

### **REMEDY FOR BREACH OF DUTY**

If a promoter fails to make full disclosure of a profit made by him out of the promotion some remedies are open to the Company. It has been argued that since the duties are owed to the Company the rule in *Foss v HARBOTLE* is relevant to their enforcement. Where for instance the promoter has sold his own property to the Company, the Company may rescind the contract and recover the purchase money.

For failure to disclose to a profit made by him out of the promotion other remedies may be available to the company. It may recover damages for fraud against the promoter<sup>14</sup> or, perhaps, damages for negligent misrepresentation.

If a promoter, even though he has sold property to the company, makes a secret profit out of the promotion of the company, he must account for the profit he has made, that is, after

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<sup>10</sup>C.B. Gower, Principles of Modern, Company Law, 3<sup>rd</sup> Edition (1969) P270

<sup>11</sup>Solomon V Solomon (1897) AC 22

<sup>12</sup>(1900) AC 240

<sup>13</sup>Morse, Company Law P.117

<sup>14</sup>Re leads (1902) 2 ch 809

deducing all legitimate expenses .E.g surveyors; and solicitors charges, and printing costs, incurred in the formation of the Company.

It is necessary here to draw attention to section 62 “(4) which provide as follows:

“No period of limitation shall apply to any proceedings brought by the Company to enforce any of its rights under the section but in any such proceedings the court may relieve a promoter in whole or in part and on such terms as it thinks fit from liability here under,, it in all the circumstances, including lapse of time, if the court thinks it equitable to do so

It is not clear from the above provision whether criminal proceedings can be taken against the promoter. Again it is not clear whether the ratification of acts done before a Company is incorporated more so with the bringing in of equity in the last part of S.62 (4).

Even with the reference made to equity, it is my submission that the law is still harsh if the Company is born it takes all the benefit but if there is a mistake somewhere and the Company still comes to life the promoter is punished.

#### **PAYMENT FOR PROMOTION SERVICES**

A Promoter has no right against the Company of payment for his promotion services in the absence of an express contract with the Company. In England such a contract will normally have to be under seal since the company cannot make a valid contract before incorporation and when the contract can be made the consideration by the promoter will normally be past. In the absence of such a contract he cannot even recover from the company payments he has made in connection with the formation of the company. In *Clintons claim*<sup>15</sup>, a syndicate promoted a company and paid some money in respect of registration fees and advolarum stamp duty incidental to the formation of the company. The company shortly afterwards went into liquidation. It was held that the syndicate was not entitled to refund for the payments they had made.

*Morse*<sup>16</sup>, contends that the rule that consideration must not be past is not part of Scots law, and the promoter of a Scottish company might be entitled to refund on a suitably worded provision in the memorandum or articles to the effect or recovering from the company, payments made by him in connection with the formation of the company. The success of a promoter’s claim against the company seems to depend on his establishing that the relevant provision creates a *jus quaesitumtertio* in his favour. Where such a right is established, a promoter is entitled to remuneration for professional services rendered. If no such right is established, neither promoters nor experts employed by them have a right to remuneration from the new company; such experts have no claim, except against the persons who employed them, namely the promoters.

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<sup>15</sup>(1877) 5 R (H.C).

<sup>16</sup>Re leeds Supra

In some jurisdictions it is usual for the articles to give the directors power to pay the preliminary expenses out of the company's funds. By article 89 of Table A: of the companies Act 1967 "the directors.....may pay all expenses incurred in promoting and registering the company." Such an article gives the promoters no right to bring an action against the company for the preliminary expenses, as it only confers discretion on the directors. However, the promoters are usually directors so that in practice the promoters.

The right of rescission may be lost in a number of ways. For example, it will be lost if the parties cannot be restored to their original positions, as where the property has been worked on so that its character has been altered. However, even if restitution is substantially possible. The right to rescind will also be lost if third parties have acquired rights for values, by mortgage or otherwise, under the contract.<sup>17</sup>

The company may compel the promoter to account for any profit he has made. In *Henderson V the Huntington Copper and sulphate Coy Ltd.*<sup>18</sup>. A prospectus stated that the Company had been formed for the purchase of certain mines at the price of 125,000 and named H. as a director; it did not disclose that H. was receiving 10,000 of the price from the vendor of the mines in consideration, as H. alleged, of services rendered by H., to the Company. It was held, in action by the company against H. that since H. stood in a fiduciary relationship to the company from the date when he agreed to become a director, the company was entitled to recover the 10,00 from H., the true price of the mines being only 115,000.

The company may sue the promoter for damages for breach of his fiduciary duty. Where promoters sell their own property to the Company, the company cannot affirm the contract and at the same time ask for an account of profits or for damages, as this would be, in effect, asking the court to vary the contract of sale and order the defendants to sell their assets at a lower price.

Apart from the remedies mentioned above, if a promoter fails to recover his expenses. The 5<sup>th</sup> schedule to C.A.M.A. requires the prospectus to state the commission and preliminary expenses paid which by implication permits such payment. Any amount or benefit paid or given within the two preceding years, or intended to be paid or given, to a promoter must normally be disclosed in a prospectus.<sup>19</sup>

The usual practice following statutory and judicial decisions is that after ratification under S.72 (1) C.A.M.A, a promoter may be compensated in any of the following ways:-

- a.** He may sell his own property to the Company for cash at an over-valuation of which proper disclosure has been made or
- b.** He may sell his own property to the company for fully paid shares, again having fully disclosed any over valuation; or

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<sup>17</sup>*Hedley ByneLtd V Hellert Patterns A.C 645*

<sup>18</sup>(1908) 2 CH 515

<sup>19</sup>(Page) 120

- c. He may be given an option to take up further shares in the Company at per (i.e at their nominal value) after their true value has risen and is reflected in their market price; or
- d. The articles may provide for a fixed sum to be paid to him.<sup>20</sup>.

### **Promoters and Prospectus**

Section 22 (5) & 543 of the Companies and Allied matters Act (C.A.M.A) provides for the issue of prospectus and in the case of Public companies.

Promoters of Companies are mandated to do this; A prospectus is a legal document issued by a company giving detailed information about itself and the securities being offered to the public such documents are usually required by law too be filed and veted by the securities commission. In Nigeria it is the Securities and Exchange Commission, that does this for correctness and subsequent registration before their release to the public. The prospectus is, in other words, a vending document which enables investor evaluate the securities being offered and decide whether or not to participate.

By section 548 of C.A.M.A and section 9 (1) SEC Act it is stipulated that it shall not be lawful to issue any form of application for securities on public company unless the Application form is issued with a prospectus.

As stated earlier a Prospectus is a document that invites offers from the public for subscription or purchase of securities of a company. However the term “Prospectus” includes not only a document described or issued as prospectus but also notices, circumstances and advertisements offering invitation to purchase or subscribe the securities.

### **Misstatements**

Since prospectus as a document is relied on by members of the public in order to make an informed decision whether or not to subscribe to purchase the securities of a public company any misstatements on it invites a serious consequence punishable in law. Misstatement may occur when a statement which is untrue or misleading in form or context is included in the prospectus. also any inclusion or omission of any matter which is likely to mislead will also be considered as a misstatement S.34 CAMA, for example a statement on the purpose of offering shares which is untrue, or statement on the locations of offices of the company which is misleading will amount to misstatement in the prospectus. The law provides civil and criminal liability for offenders including promoters for misstatements and negligence.

### **SUSPENSION OF PROMOTERS (S.188 Companies Act 1967)**

A person who has been convicted on indicted of any offence in connection with the promotion or formation of a company may have an order made against him by the court that he shall not, without leave of the court, be a director, liquidator, receiver or take part on the management of a Company for a period of up to five years. The C.A.M.A. 1990 has no similar provision.

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<sup>20</sup>S. 38 (1) Companies Act 1967

## **PRE-INCORPORATION CONTRACT**

Some scholars refer to this term as preliminary contracts<sup>21</sup> or preliminary agreements<sup>22</sup>. The term simply means contract made before the incorporation of the company before its birth is the promoter it follows that the contracts are made by the promoters.

A common law, nobody can contract for an unincorporated company as agent because an act which cannot be done by the principal himself cannot be done by him through an agent, nor can a pre-incorporation contract is purported to be made by a Company which does not exist, the contract is a nullity, and neither the company when formed, nor the promoter whose signature is added, can sue or be used on the contract. To make a contract valid there must be parties existing at the time who are capable of contracting. Both upon principle and upon authority, a non-existent company cannot be held liable under a contract entered into before its incorporation and it cannot take any benefit under it. Thus, a deed of assignment of lease executed by a promoter purportedly for the benefit of a company then unincorporated is void and the company cannot obtain an order for specific performance of the agreement.<sup>23</sup>

It cannot even ratify such a contract after incorporation. However there is nothing to prevent a company from entering into a new contract. It is for the same reason that a company can properly be incorporated for purposes of taking over an existing business or asset.<sup>24</sup> A subsequent ratification by a company of an agreement purporting to be made on its behalf prior to its formation can only be with the consent of the other party, and then it will in effect be a new contract.<sup>25</sup>

A company is liable for a pre-incorporation contract where it admits liability in its pleadings in an action instituted by the creditor. The general principle of estoppel will apply to bar it from disputing liability.<sup>26</sup>

Nigeria Law on this subject was governed by the common law principles cited above. This was a source of serious problems and hardships to promoters and the parties, and legal practitioners have had to devise intricate agreements to protect the interest of promoters and the Report on the reform of Nigerian Company Law had this to say and it did.

“We, therefore, intend in the draft Act to make provisions codifying the common Law principles after necessary amendments”

Section 72 of C.A.M.A. Provides thus:

“Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become

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<sup>21</sup>Trans Bridge Co. Ltd V Survey Int. Ltd (1986) 4 NWLR (Pt 37) 576, Societe General Bank (Nig) Ltd V Societe Generale France (1995) 4 NWLR (Pt384) 497.

<sup>22</sup>Gower- Company Law

<sup>23</sup>Farra, Company Law

<sup>24</sup>Urhobo V Tarka (1996) 1 FNLR 208 HC.

<sup>25</sup>Sparks Electrics (Nig) Ltd 6 Ponmile (1986) 2 NWLR (pt 23) 516

<sup>26</sup>Enahoro V Bank of West African (1) NCLR 180 1971 (1) ALR Comm.180 S.C.N.

bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto.

Prior to ratification by the company, the person who purported to act in the name of or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.”The relevance of this section is not yet very clear until it is given a thorough judicial interpretation; questions have been asked whether the provision is a codification simpliciter of the common law? or whether it has altered the existing position? In what ways should a pre-incorporation contract be ratified? The section did not clearly state this.

However, that section is an improvement on the common law position and its intended to enable companies after incorporation to ratify or adopt the agreement of promoters either expressly or by conduct. The implication being that the common law ban on ratification of pre-incorporation contracts has been lifted.

### **ACQUISITION OF LAND**

The registration of ownership of land or interest in land under the Registration of Titles Act, in the name of a company which is not incorporated at the date of such registration, is void and of no effect<sup>27</sup>

### **PROMOTERS AS NECESSARY EVIL**

A promoter whether or not he is a professional creates or helps to create the company and seeks to sell something, whether his services or a business. In the process he is so placed that he can easily take advantage of his position by obtaining recompense grossly in excess of the true value of what he is selling. It is at this point that promoters are seen as evil because he is or they are seen as people who are out to defraud the investor by presenting them with mouth watering prospectus which turn out to rip them off<sup>28</sup>. Those in mind here are the professional promoters.

A recent case in mind is the Mavrodi Mundial moneybox known as MMM GLOBAL which was formed in 2011. It is a Ponzi scheme promoted by Sergei Mavrodi, it became popular in over 110 countries including Nigeria.

MMM launched a website in Nigeria in November 2015 targeting Nigeria investors and claiming a 30% per month return on investment including other bonuses. The entity was self-described as a “mutual aid fund where ordinary people help each other” it was reported that as at the end of 2016 over 2.4 million Nigerians had invested in the scheme. The promoters targeted the country’s unemployed millions and it worked. Even Nigeria’s Economies and Financial Crimes Commission confirmed that it was monitoring the scheme until the first crash in December 2013.

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<sup>27</sup>Figos Ltd. V Zetter Pools Ltd. (1965) L.L.R. 113 HC Lagos

<sup>28</sup>National Investment & Properties Ltd. V Bwa Ltd (1962) ALL/NLR 556

By January 2017 many similar Ponzi scheme jumped into the industry promoting similar scheme and eventually crashed like the MMM with over N18 billion lost by investors in the scheme. Many Nigerians have argued that the pains inflicted on Nigerians who lost their investment on this scheme is part of the evil promoters unleash on the economy.

Others contend that some of the prospectus or call it statement in lieu of prospectus issued by the promoters with respect to public companies are fraudulent and so they should be punished by the law. However whether the promoters of MMM and similar scheme qualify under CAMA as promoter is a discussion for another day.

Again whether this position is wrong or right is arguable and would depend on the facts and circumstances of each case but ordinarily a promoter imposes no particular hardship and does not constitute danger to any investor, all that he does is to make investment easy by packaging an outfit called a company which individuals can become members taking or influencing decisions as to the management of the resources they invested.

Promoters prepare the frame work, bring investors together to pool their resources together and incorporate a company. The capital of the Company is made up of share, which members of the Company have agreed to subscribe to, thereby making investment more convenient and less burdensome as the liability of a shareholder or member is limited to the number of shares he has subscribed or agreed to take. His personal property cannot be sold to repay creditors in respect of the debt of the Company.

## **CONCLUSION**

An objective view of the activities of promoters will show that they have contributed immensely to the economic growth of nations. Small amount of capital is contributed by several people and when put together forms a bulk sum with which investments could be made. The investor may not even be involved in the management of the business but only lose the much he has invested in the event of collapse of the business and not his personal property.

The perception of promoters as evil in Nigeria is not unconnected with the corruption and decay in the economic, political and social life of her citizens. The enthronement of fraud and glorification of fraud starts. This however is not a blanket approval of the activities of all promoters as some of them are evil but general they make valuable contributions in the economic life of a nation.

All that is needed to be done is to codify and regulate their activities legally. Without promoters it would have been very difficult to turn the wheels of progress of the economy of most nations. Large scale business ventures that create employment generate tax for the government produce goods and services which make life more meaningful for the citizens would have been difficult to come by. Though some people may argue that promoters are evil, I submit that they are necessary evil in the economic life of a nation.