AN APPRAISAL OF THE CONCEPT OF MULTIPLE DIRECTORSHIPS UNDER NIGERIAN COMPANY LAW

BY

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LL.M/LAW/07533/09 -10

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JUNE, 2011

DECLARATION

I hereby declare that this thesis is the result of my own research. The thesis has been written by me, and has not been published or presented either in whole or in part for another degree elsewhere. All quotations and references have been indicated and specifically acknowledged.

SIAKA ISAIAH IDOKO-AKOH

CERTIFICATION

This thesis entitled **AN APPRAISAL OF THE CONCEPT OF MULTIPLE DIRECTORSHIP UNDER NIGERIAN COMPANY LAW** by **SIAKA ISAIAH IDOKO-AKOH** meets the regulations governing the award of degree of Master of Laws of the Ahmadu Bello University, Zaria and is approved for its contributions to knowledge and literary presentation

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DEDICATION

This thesis is dedicated to my parents late Pa Idoko Akoh and late Chief Mrs. Omada Idoko Akoh, who inculcated in me the discipline and hard-work that enabled me to benefit from Western education and indeed mortgaged family comfort to fulfill their dream of having a professional lawyer.

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SIAKA ISAIAH IDOKO-AKOH
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ABSTRACT

Increasing cases of dissatisfaction with the activities of members of board of directors of companies provoked the thought of researching into the subject of the practice of multiple directorships under Nigerian company law. At common law, multiple directorship is a situation where a director is on the board of two or more companies. The Nigerian corporate industry today is characterized by the practice of multiple directorships in their governance. The Nigerian Companies and Allied Matters Act, 2004 (CAMA) recognized the concept and has in section 281 of the Act provided for multiple directorships. This research work examines the concept and practice of multiple directorship in corporate management in Nigeria with particular reference to the directors fiduciary duties of loyalty and good faith, duty of care, due diligence, transparency and accountability to the different companies on which a. director is on their boards. The research establishes that the concept of multiple directorship is incompatible with the application of fiduciary duties of loyalty and good faith of directors to their companies. It encompasses various possibilities of grave abuses that could contribute largely to the malaise of many companies due to poor performance of the board and consequent failure and collapse of the corporate entities. The research further establishes that the Nigerian company legislations and the various rules and regulations put in place by the companies regulatory authorities are inadequate to address the dangers of conflicts of

interest and the negativities brought about by the practice of interlocking directorate/multiple directorship that have made several corporate entities moribund. The overall implication of the findings of the research is that the Nigeria Company Law need to be reformulatec and adequate rules and regulations put in place by the various company regulatory authorities as recommended in the thesis to put the Nigerian corporate industry on a booming path.

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ACLR	Australia Commercial Law Reports (New South Wale) 157
ALL NLR	All Nigeria Law Reports 127, 132, 211
ALR Comm	African Law Reports (Commercial Law Series) 122, 143
ALL ER	All England Law Reports 7, 15, 30, 51, 56, 58, 60, 61, 73, 98, 99, 101, 102, 103, 105, 106, 107, 115, 133, 146, 154, 156, 157, 201, 203
APP	Cas. Appeal Cases (House of Lords) 115, 140, 151, 165, 199
Atks	Atkins English Chancery Reports 55, 63, 68, 69, 77
Beav	Beavans Reports, Rolls Court 69, 70
Ch.	Law Reports, Chancery Division (Since 1890) 23, 24, 36, 44, 45, 50, 51, 52, 56, 57, 58, 63, 64, 65, 66, 70, 72, 78, 83, 85, 87, 90, 91, 92, 95, 96, 97, 98, 99, 100, 101, 103, 106, 117, 119, 122, 123, 124, 125, 126, 128, 130, 134, 136, 142, 143, 144, 147, 150, 169, 173, 178, 199, 200, 201, 207
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Ch. D	Law Reports, Chancery Division 51, 63, 64, 65, 70, 72, 71, 72, 73, 74, 82, 83, 87, 126, 130, 153
CLR	Commercial Law Reports, Common Wealth Law 102, 103, 104, 106, 151
Del Ch.	Delaware Chancery Reports (United States) 4, 10
DLR	Dominion Law Reports 158, 202
E.R	English Reports 139
Hag.	Haggard Ecclesiastical Reports 117
I.R	Irish Reports (Court of Appeal) 86, 112, 154
K. B	King's Bench Reports 50, 51, 56, 58, 59, 65, 154, 200
LRN	Law Report of Nigeria 72
LR Ch.	Law Reports, Chancery 63, 64, 70, 78, 80, 87,130, 148, 150
LR. CP	Law Report, Common Pleas 96
LR. HL	Law Reports, British & Irish Appeals (House of Lords) 124
LT	Law Times Report 78, 111
Macq (H.L)	Marquis Reports, House of Lords 148, 198, 200

NMLR	Nigeria Monthly Law Report	207
NCLR	Nigerian Commercial Law Reports	79, 143, 155
NSCC	Nigerian Supreme Court Cases	91, 210
NWLR	Nigeria Weekly Law Reports	49, 80, 105
Q.B	Queen's Bench Reports	54, 72, 138, 140, 142, 148, 182
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WLR	Weekly Law Reports	18, 30, 56, 88, 99, 103, 145, 147, 150, 168, 183, 192, 201, 207, 209
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Cal L. R.	California Law Review	82, 219
C. L. Q	Commercial Law Quarter	68
CLJ	Commercial Law Journal	152
Col Law	Colorado Lawyer	218
I.L.BQ.	International law & business Quarterly	217
IBL	International Business lawyer	218
L.J Ch.	Law Journal	132
L. Q. R	Law Quarterly Review	54, 219
M. L. Rev	Monthly Law Review	123, 203, 217, 219
NYLJ	New York Law Journal	64

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N.L.J.	Nigerian Law Journal	23, 24, 217
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U. Mich. J. L Reforms	University of Michigan Journal of Law Reports	172, 218
NCLR	Nigerian Current Law Review	217
JTN Law & Pol.	Journal of Transaction law & Policy	219
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MISCELLANEOUS

AP.PLC	African Petroleum Plc	43, 195
CAMA	Companies & Allied Matter Act, LFN 2004	4, 6, 10, 21, 25, 26, 37, 45, 47, 49, 78, 81, 84, 104, 105, 111, 112, 116, 131, 134, 135, 151
CAC	Corporate Affairs Commission	216
CBN	Central Bank of Nigeria	1, 2, 195, 216
CJ	Chief Justice	79, 115
HMSO	Her Majesty Stationary Office	12, 54, 64, 65, 71, 72
IMB	International Merchant Bank Plc	2, 21, 38, 196
J.S.C	Justice of Supreme Court	61, 92, 127, 213
L.C	Lord Chancellor (UK)	55, 200
L.J.	Lord Justice	56, 58, 63, 72, 78, 139
M. R.	Master of the Rolls (UK)	24, 66, 69
NAMBL	Nigerian American Merchant Bank (New Defund)	3, 43, 195
NNPC	Nigerian National Petroleum Corporation	195
SEC	Securities and Exchange Commission	1, 2, 3, 10, 23, 27, 9, 39, 195, 196, 216
SEC APC//SEC APU	Securities and Exchange Commission Administration Proceedings Committee (1992 – 1999)	3, 195
U.K	United Kingdom	12, 215
U.S.	United States of American	22, 50, 83, 136,138,142, 180, 205, 207
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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background

On my enforcement desk in the Securities and Exchange Commission, I came across two outstanding cases among others that provoked my thought on the subject of the practice of interlocking directorate and multiple directorships under Nigerian Company Law.

One which remained unresolved until I left the commission was the refusal of the Board of Golden Guinea Breweries Plc to recognize the investment or major acquisition of its shares by its foreign technical partner (Floco) even though payment for those shares was made through debt conversion Programme of the Central Bank of Nigeria (CBN).[1] At the peak of that intra - company crisis, some directors of the Brewery who paid for those unsubscribed shares, not taken, because it was feared that the company was going under and they might loose their investment in the circumstances, later conspired

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1 ***Matter No. MAPU /10/12/01. Golden Guinea Breweries Plc-v- Floco SEC Memo dated 19/12/2001; See also Suit No. FHC/UM/CS/236/2001 Chief A.U. Nsofor & Anor –v- Golden Guinea Breweries Plc & others and also suit FHC/ABJ/110/2002 SEC-V- Golden Guinea Breweries Plc. Note: white the first suit brought by a director of Golden Guinea Breweries sought to frustrate the foreign investors, the second suit brought by SEC was to compel the company to recognized the foreign investors.***

to deny the registration of additional substantial shares in favour of their foreign technical partner.

The acquisition of those shares gave the foreigner a majority shareholding and power to alter the composition of the Board of the company to his advantage whenever he wishes. A director of the defunct International Merchant Bank Plc ("IMB") who is also on the Board of the Brewery Company used his dual appointments and position to disallow its subsidiary company, IMB securities Ltd, who is Registrars to the Brewery Company to register the shares in favour of the foreign technical partner, in the register of members.

The refusal to register the shares in favour of the foreigner and the disobedience to SEC's directive were of grave concern to the SEC especially as the acquisition brought in foreign fund paid through CBN debt conversion programme to revive the ailing Brewery Company. The action smacked of confidence in the capital market, which the government was trying to build through effective regulation of the sector to prevent foreign capital flight.

The matter came before SEC as the regulator of Nigerian Capital Market. The frustration of SEC order was made

possible by the managing director of IMB under whom IMB securities is a subsidiary, who was also a director on

the Board of the Brewery Company.

The second case was between the defunct Nigerian American Merchant Bank Ltd (NAMBL) -v- Enpee Industrial Plc (ENPEE").[2] In that case, NAMBL acted as issuing house to Enpee's public offer. NAMBL Breach the regulatory rules and was asked to pay a fine of N2.1Million Naira. NAMBL decided to pass the liability to Enpee under clause 7 of the under writing agreement and consequently deducted the said sum of N2.1 Million from the offer proceeds remitted to Enpee.

The striking issue there was the discovery when the matter comes to SEC that the chairman of the Board of NAMBL was also the chairman of the Board of Enpee Industrial Plc and yet he could not prevail on the companies to resolve and settle the matter amicably. In the course of the dispute, NAMBL sued SEC for an order of injunction restraining SEC from imposing on it sanction of suspension from operating in the market[3]. In the ensuing corporate business, politics, NAMBL was made to withdraw from the court while SEC used its regulatory "sledge hammer"

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2. ***See case No. APC/13/2001: ENPEE Industries Plc –v- Nig American Merchant Bank Ltd. SEC APU. Record of proceeding (2000-2002) P, 30-48. See also suit No. FHC/L/CS/317/2001 NAMBL –V- ENPEE Industries Plc (suit was later withdrawn at the instance of the plaintiff bank).***

3. ***Suit No. FHC/L/CS/436/2002. The suit was subsequently withdrawn after an amicable settlement before the commission***

to force the liability on Enpee, a decision which Enpee reluctantly accepted.

The problems that emerged in the above two cases arose from the multiple and interlocking appointments. The conflict negatively affected the management and fortune of the companies. The double barrel effect was the drift toward the collapse of the corporate entities and loss of investor's funds amongst others. Thus this thesis is designed to expose the concept of multiple directorship and its effect on corporate governance.

1.2 The Concept and Definition of Multiple Directorship

Multiple directorship is a situation where a director is on the board of two or more different companies.[4] The development and growth of companies in the industrial and financial sectors of the Nigerian economy has been characterized by incidence of this interlocking directorate and multiple directorship with legal backing provided by the Nigerian companies and Allied Matters Act.[5] Under Common law, this concept is known as interlocking directorship.

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4. *See Meyerson – v – El Paso Nat. Gas Company, 246A 2nd {Del. Ch. 1967} See also Black's Law Dictionary (6th Ed.) P. 815. which describes interlocking director as persons who serve simultaneously on the board of directors of two or more corporations that have dealing with each other.*
5. *See Section 281 CAMA, Cap, 120, LFN 2004 hereinafter referred to as "CAMA".*

On the other hand, corporate governance is the relationship between shareholders, directors and management of a company as may be defined by corporate charter, by – laws, articles of association, formal policy and the rule of law. The relationship is about promoting corporate fairness, transparency and accountability.[6]

It thus, represents the corporate value, ethical and moral framework in which business decisions are taken and implemented. In concept and definition, it transcends corporate management, focusing more prominently on monitoring and control of executive actions. The process ensures that businesses are well managed through demands for accountability and checks on management behavior.[7]

A critical analysis of companies in Nigeria today show the existence of these interlocking directorates and multiple directorships in their governance. The issue of multiple directorship has therefore become a subject of public interest and comments in view of the need for due process, transparency and honesty in the management of the companies on whose boards they preside as directors.

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6. ***Wolfensohn, J. former President of the World Bank.***
7. ***See generally "Schwartz, B. & Goodman, A. "Corporate Governance: Law and Practice" Lexis Nexis (Matthew Bander Ed.) Vol 1, 2005.***

The Nigerian Companies and Allied Matters Act, 2004[8] in recognition of the concept, had accordingly made a provision for interlocking directorship tagged "multiple directorships" in section 281 of the Act.

The provision states as follows:

> "The fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company including a duty not to use the property, opportunity or information obtained in the course of the management of one company for the benefit of other company or to his own or other person's advantage".[9]

This concept seems to have some consequential dimensions on corporate governance in view of the duties that law has imposed on the office of directors and corporations under Section 282(1) of Companies and Allied Matters Act, 2004.

This research work is designed to examine the concept of multiple directorship in corporate governance in Nigeria with particular reference to the fiduciary duties of loyalty and good faith as well as duty of care, due diligence and accountability to the different companies on which a director is on their boards.

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8 *CAMA Ibid*

9. *S. 281 of CAMA*

This excludes holding companies, which do not normally owe any fiduciary duty of loyalty and good faith to its subsidiaries even when the subsidiary has an independent Board.[10]

Finally, the inspiration to choose this research topic is borne out of the changing profile of shareholders of companies in Nigeria and the evolution of a more enlightened society that has led to increasing dissatisfaction with the activities of directors representing them on the boards of companies.

The study is focused on the desirability or otherwise of the concept of multiple directorship in modern company management, control and administration. It involves a review of the work of some known researchers, scholars and authors in view of dearth of judicial pronouncement on the subject so as to properly understand the theoretical explanation of the concept of multiple directorship and its effect on corporate governance in Nigeria's corporate industry and their inter- relationship.

.3 Statement of The Problem

The problem identified and which forms the basis of this research borders on conflict of interest and abuses in the

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10. See Olawoyin, G. A (Supra) P. 43, See case of Unit Construction Co. ltd –V- Bullock (1959) 3 AllER 831 & Lindgren –V- L&P Estate Ltd (1968) 2 WLR 562 p. 570 -571.

discharge of directors fiduciary duties of loyalty and good faith owed the companies he is on their boards."

Precisely, the problems are those of commitment of the director to management principle of integrity and transparency as well as accountability in the business operation and legal framework of companies.

However, the problem area does not include multiple directorates in a holding company but in different companies. This is because holding companies do not owe any fiduciary duty of loyalty and good faith to its subsidiaries even when the subsidiary has an independent Board.

1.4 Objectives Of The Study

The objectives of this study are as follows:

1. To examine the concept of multiple directorship and to determine its consequential dimension and its impact on companies' management and governance.
2. To examine the phenomenon and perspective of multiple directorship.
3. To examine the concept vis-à-vis the legal fiduciary duties of directors in the corporate industry and to determine whether a director on the board of two or more companies can effectively discharge these duties imposed on him by law.

4. To determine the necessity for the continuous retention of the principle in the legal framework for the governance of Nigeria's corporate industry.

5. To examine the judicial attitude towards this concept that has become part of our company law.

6. To make recommendations for legislative reforms where and if necessary.

1.5 Limitation/Scope of Study

The scope is limited to the stated objectives. Therefore the work focuses on the concept of "Multiple" directorship and its effect on director's fiduciary duties in governance of companies in Nigeria.

The work refers to specific instances of interlocking directorship, the status of directors and the discharge of their fiduciary duties of loyalty and good faith in the best interest of their companies and their duties of care and skill. It also covers judicial attitude on issues involving interlocks and recommendations on the best option for the Nigerian corporate industry.

Finally, reference is made to common law jurisdiction for first hand information on how issues involving multiple directorship have been resolved to chart way for good corporate governance.

1.6 Literature Review

A review of the company laws and legislative provisions[11] allowing the practice of multiple directorship shows that they do not contain provisions that could squarely address the dangers of the conflicts and abuse of the directors fiduciary duties. The research further establishes that these conduct negatively effects the corporate governance in that it makes nonsense of the modern principle of effective and efficient corporate management. From the foregoing, background, an extensive research through contacting laws and legislations and various work of learned authors and journals, was undertaken.

The first issue was to find out the meaning of multiple directorship as well as corporate governance. Going down memory lane, neither the Nigeria's Companies Act nor the English Companies Act contains definition of multiple directorship. However, Blacks Law Dictionary described it as a situation where a person serves simultaneously on the boards of two or more corporations that have dealing with each other.[12]

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11. See 281, CAMA Cap 120 LFN 2004. See also SEC's Corporate Governance Code For Public Companies & Central Bank of Nigeria Corporate Governance Code for Banks and Other Financial Institution

12. See Blacks Law Dictionary (6th Ed) P. 815 See also Meyerson –V- El Peso Nat. Gas. Co. 246A, 2nd (Del. CH. 1967).

Gower and Davis in their principles of modern company law[13] made reference to competing multiple directorships but failed to provide a definition as all he could say was a general discussion of the acts and duties required from a person who is on the boards of different companies.

Olawoyin gave a clearer explanation close to the description provided in Blacks Law Dictionary when he described multiple directorships as a situation where one person is on the board of two or more companies.[14]

The inability to come up with precise acceptable definition points to the fact that the concept has been perceived as casual. In other words it is not considered to be too important, because captains of industries little appreciate the evils associated with it.

Just as the phrase multiple directorship lacks precise definition, there is also the difficulty in defining corporate governance. Academically, it could be said that corporate governance represents the value framework, ethical framework as well as moral framework in which business decisions are taken and implemented.

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13. Gower &Davis' Principles of Modern Company Law (8th Ed) p. 570-574.

14. Olawoyin, G.A. op. Cit P. 164.

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In England, Birds et-al [15] tried to provide a definition of corporate governance based on the definition in the Cadbury Committee Report [16].

In the report, corporate governance is defined as "the system by which companies are directed and controlled".

To Tricker's [17] schools of thought, corporate governance is about "giving overall direction to the enterprise with overseeing and controlling the executive actions of management and satisfying legitimate expectations for accountability and regulation by interests beyond corporate boundaries". He concluded that if management is about running business, governance is about seeing that it is run properly.

To Farrah and Hannigan, [18] the concept of corporate governance is shrouded in uncertainty and this lacks precise definition. However, they went on to adopt the definition in the Cadbury Committee report by

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15 ***See Birds, J. et-al, Boyle & Birds Company Law, 4th Ed. Bristol: Jordan Publishing Ltd (2000). P. 345***

16. ***See Cadbury Committee Report on Financial Aspects of Corporate Governance, UK (1992) ("the Cadbury Committee Report") Para 2.5. The UK Department of Trade & Industry adopted this definition in its Consultation Paper on Modern Company Law for Competitive Economy in March 1998 (HMSO) Para. 35***

17. ***Tricker, R. I.: "Corporate Governance" Gower Publishing Company (1994) P.6.***

18. ***Farrah, J. H. and Hannigan, B. M, Farrah's Company Law, (4th Ed.) London Edinburgh & Dublin, Butterworld's (1998) P. 301-302***

describing it as "the process of direction of a company, the relationship between the board of directors and the management and ultimately about the problems of accountability".

In the treatment of corporate governance by these learned authors, they have tried to provide definitions and explanations, but they seems not to have been able to provide the link or nexus between corporate governance and interlocking and multiple directorships. This has not really brought out the very importance of the relationship between the two concepts and their relevance in the modern company management and administration.

Professor Skinner,[19] in his research explained that interlocking directorship would occur either directly or indirectly. He also discussed the nature of interlock in different situations and went further to show that indirect interlock could be either vertical or horizontal or symbolic interlock based on its directions. The author's beautiful, mind boggling and thought provoking analyses of the concept of interlocking directorate seems to have, albeit, deliberately or otherwise avoided discussing the effect and impact of the principle on corporate governance. Such

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19. *See Skinner, D. "Unlocking the Interlocks: Common Law Fiduciary Duties and the Phenomenon of Interlocking Directorates in the Commonwealth Caribbean" 3 Journal of Transnational Law &Policy Vol. 53, 1994.*

discussion would have provided insight into how to deal with problems that might be associated with interlocking and multiple directorships.

Gower and Davis' Principles of Modern Company Law[20] carried out an elaborate discussion on the duties of directors. Issues of fiduciary duties of care and skill, loyalty honesty and good faith required of directors on company boards were generally thoroughly discussed. Similarly, the judicial attitude and sanctions that go with breaches relating to these duties were equally discussed. It was submitted that directors in the exercise of their fiduciary duties should not allow their interest to conflict with the interest of the company on which they are on their boards. Reference to multiple directorships was scanty and thus failed to show the effect of interlocking directorate and multiple directorships on companies.

A typical example is the learned author's treatment of judicial attitude where there is conflict of interest with the use of corporate information, opportunity and company's property. It has been submitted that a director cannot simply escape liability on the ground that he acted in good faith (i.e that he had acted honestly or formed the

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20. Davis, P. L. "Gower &Davis Principles Of Modern Company Law. (8th Ed), Thomson Sweet &Marshall (2008) chap. Xvi PP. 475 -604.

view that the company's interest were not capable of being harmed by what was done), for the question of whether an actual or potential conflict of interest has arisen is one for the courts.[21]

The case of **Regal (Hasting) Ltd –v- Gulliver**[22] where the House of Lords held "that directors are liable to account to the company for profits made from the personal exploitation of corporate opportunity once it was established" was cited to demonstrate how the courts of law can identify conflict in such circumstances.

Application of the judicial approach to a situation where a person is on the board of several or two competing companies will surely produce a negative effect as such conflict will benefit one of the company to the detriment of the other.

Thus Davis[23] after critical examination of the duties of directors and its fiduciary nature and seems not satisfied with all the various academic theories and approaches to them, opted for a reform proposal and legal provisions that will lay out measures and produce practical solution that can sustain a company from corporate failures and collapse.

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21. Gower & Davis, Op. Cit 559
22. (1942) 1 AllER 378
23. Gower & Davis (supra) 475 -604

Another major text reviewed in the course of this work is Charlesworth and Cain on company Law.[24] The text, like most company law books, treated duties of directors in extenso but said nothing with respect to the number of the board appointments a director can hold.

Prasad[25] in his book on Corporate Governance recognized the concept of interlocking directorship. He tried to propagate "the concept of corporate dashboard"[26] started in the 1970's which emphasizes the need to focus on those activities that will contribute to revenue generation as opposed to the rather classical executive focus on the profit and loss account and management account with the objective of micro-management and cost cutting for business efficiency.

Turning to interlocking directorate and board management,[27] his attention was more on the inability of the director holding multiple appointments be to efficient on the boards of those companies on account of lack of time for all the companies he is on their boards. To him, it would seem the issue of conflict of interest is narrowed down to serious conflict in time management rather

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24. ***Charlesworth & Cain, Company Law (12th Ed) Chap. 16 P. 327-386***
25. ***Prasad, K. "Corporate Governance" (Prentice –Hall of India Private Ltd) New Delhi, 2006***
26. ***Prasad, K. Ibid p. 97 Para. 4.6***
27. ***Prasad, K. Ibid P. 80, Para 3.10***

than the conflict bordering on competition with the company's use of information, opportunity and company property.

There again seems to be over assumption that no problem really exists in all other aspects where conflict of interest could arise. If this is so, it means that he has not really addressed his mind to modern business demand that activities of directors in a fiduciary should be towards promoting the success of the company for the benefit of members while avoiding any element of corporate failures.

The first attempt to discuss the concept of multiple directorship in Nigeria was by professor Olawoyin, [28] whose work then was based on the 1968 companies Act [29].

He discussed the concept under the use of insider information and knowledge.[30] He recognizes the fact that the Act did not place limit on the number of directorships to be held by a single person and that nothing prevents a director from accepting other directorship unless there is an agreement to the contrary which agreement he said could be express or implied. Such agreement is implied when a director is expected to devote his whole time and

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28. Olawoyin, G. A. "Status and Duties of Company Directors. (University of Ife) 1977

29. Nigeria Companies Act, 1968 s. 191, Article 78, table A 1st Schedule

30. Olawoyin Ibid P. 164.

attention to the management of the company. On the other hand, it is express where the prohibition is by law or by the constitution of the company.[31]

The focus of the writer then was more on the insider abuse arising from a director in a fiduciary who holds multiple directorships or involved in interlock. It is this abuse that attracts condemnation of the concept by some leaned authors and jurist.[32]

It suffices to note the interesting position of the learned author accepting the condemnation by Brandeis and the positive acceptance of the concept by Bearle and Means[33] that the duality of interest could be to the advantage of both companies for reasons of commercial benefits that may flow from it[34]. However, if the wave of current company failures and collapse were thought of at the time Professor Olawoyin wrote his book, he would have done further justice to his discussion of the concept and practice of interlocking directorship introduced into the body of Nigeria's company law.

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31. ***Reference here is to the Articles and Memorandum of Association of the company or letter of appointment. See also Memorandum of Courtaulds Ltd which introduced qualified prohibition in "Minutes of Evidence taken before the Company Law Committee" (1960-1962) P.60 referred to "Minutes of Evidence". The Memorandum is to the effect that consent of the company could be obtained.***
32. ***See Brandies, L.D "Other Peoples Money" 1933 Ed P. 35-42 and PP. 56-60. & Regal (Hastings) Ltd –V- Gulliver (1958) 3 WLR 404***
33. ***Bearle & Means," The Modern Corporation and Private Property (1932) P. 321***
34. ***Olawoyin, G.A Op Cit, p. 168***

Sesegbon, in his work on Nigeria Companies and Allied Matters Law and Practice referring to section 279 of the Nigerian Companies Law,[35] after a painstaking analysis recognized that this section has achieved an express incorporation of all time important principle of English common law having to do with the fiduciary duties of directors to the body of the Act. He exposed the way and manner, directors in a fiduciary are to act for the benefits and promotion of the company and will not incure liability. The book also discussed how the duties are to be exercised and enforced.

He also like many other authors and jurists recognized that there should be no conflict of duties and interest. The recognition of the common law and equitable principle presupposes that a director must not put himself in a situation where his duties will conflict with his personal interest.

It is recognized that our company law made provision for multiple dierctorships[36] which means that a person may hold more than one directorship in companies but he has critised the provision on the ground that the practice can give rise to a situation in which a director could compete with his company where he has a private business or his

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35. ***Sasegbon, D. Nig. Companies and Allied Matters, Law & Practice" (1991) vol 1 P. 438 -441***
36. ***Sasegbon, D. Ibid P. 442***

associate businesses. He doubts the impartiality of the director to bring sound judgment and honesty in the performance of his fiduciary duties in transactions with the companies on which he is on their boards in such situation.

Referring to the exception provided under the English Companies Act, 1985, that a person holding multiple directorships must disclose such appointments, he observed that the provision in CAMA did not place limitation on the number of directorship a person can hold at a time. He concluded that the provision is thus too

generous in not requiring directors to disclose all their directorship. This is also a major criticism against the Indian Companies Act,[37] which permits multiple directorships even in small scale industries.

His analysis stops here and did not go further to look at the issue of insider abuse and the danger of corporate failure and collapse, and others, such as fraud and financial mismanagement which formed the bases for the statutory codification of the law and the equitable principles on the

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37. See Indian Companies Act, 1956

conflict of duties and interest of directors of a compnay[38], in a situation where a single person holds multiple directorship in two or more companies.

Idonigie[39] drawing inspiration from the writing of Professor Skinner[40] on this subject came up with a general academic discussion on the concept of interlocking directorship in relation to good corporate governance. He attempted a review of the provisions of section 281 of our companies law (CAMA) which deals with multiple directorships, but was limited by the dearth of material in our jurisdiction. He fell back on the common law principles on the duties of directors where he discussed the issues bordering on fiduciary duties of directors. He identified duty of care and skill and danger of conflict of interest and duties in a situation where a person is a director on the boards of two or more companies.

In the analysis of the effect of the practice on corporate governance, he submitted that the practice has its evil and as well its good advantage but suggested after reviewing

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38. *See Bray –v- Ford (1869) AC 44 where Lord Herschall said as far back as 1869 that the rule is based on the consideration that human nature being what it is there is danger, in such circumstances of persons holding a fiduciary position being swayed by interest rather that by duty and thus prejudicing, those whom he was bound to protect.*
39. *Idongie, P.O"Interlocking Directorates and Corporate Governance". International Business Lawyer Vol. 32 No. 2 (2004) P. 75 -82.*
40. *Skinner D. (supra).*

the practice in other jurisdictions such as United States of America and India that a reform be carried out to minimize the negative effects of interlocking directorates which is already affecting the Nigeria corporate industry. A major oversight of the writer just as is the case with Sesagbon, is that he failed to see the effect of the concept in relation to corporate failures and collapse.

Thus, criticisms trail the concept and practice of interlocking/multiple directorships. For instance in the United States of America ("US"), the Federal Anti-trust Laws prohibited Interlocking /multiple directorships of competing businesses for reason that such director may create problem involving fiduciary duties of directors.[41]

In India, the law imposes a limit of twenty on the member of directorship, which a single person may hold at a time[42]. This has of course been considered illogical by the federation of British Industries which is of the view that the responsibility falling on a director of a very large company may be much greater than that falling on a director of a string of much smaller companies whose affairs give little problem.[43]

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41. ***See SEC- V- Chenery Corporation 15 US CA 80 (1866)***
42. ***See Indian Companies Act, 1956, S. 27***
43. ***See "Minutes of Evidence" P. 1448 (i.e Minutes of Evidence Taken before the Company Law Committee) See also reference to memorandum by Courtaulds Ltd requesting for prohibition.***

The forgoing review did not address the fact that problems emerging from interlocking directorship could lead to corporate failure and collapse. But like I had earlier stated the inspiration to research into the concept and practice of multiple and interlocking directorship came from my experience on my enforcement table at Securities and Exchange Commission (SEC). I therefore found the articles of A. A. Akume[44] and E. O. Akanki. [45] of interest.

Akume A.A, in his beautiful and well researched articles alluded cases of such collapses to managerial problems with include boardroom crisis and lack of skill or dynamism, under capitalization, fraud, poor financial management, investor protection, activities of host community. He considered the provision that has to do with corporate collapse including the decision in **Hutton -v- West Cork Railway Co.**[46] and **Greeniagh -v- Arden Cinema**[47] where Lord Justice Bowen and Lord Evershed M.R have respectively expatiated that the running of the

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44. Akume, A. A, "Predicting Corporate Collapse in Nigeria", Modus International: Law &Business Quarterly, Vol 4. No.2, (1999) P. 43 – 49 & Akume A.A, "The Phenomenon of Corporate Collapse and its Impact on Developing Economy (ABU Journal of Common Law Vol 1, No. 1 (2002) P. 40 -53).

45 Akanki E.O "Judicial Discretion to Winding Up a Company" Nig Current Law Review" (1982) P. 110-120. See also Akanki E.O, "Negligent Management by Company Directors" (1975) 9 NLJ 47.

46 (1883) 23 Ch. 3 P. 654.

47. (1915) Ch 286.

affairs of the company must be for purpose beneficial to the company.[48]

The fact that the practice of multiple and interlocking directorship provided under section 281 because of the inherent problem associated with it could lead to corporate collapse was not addressed. His failure would not amount to crucifixion yet in view of the fact that he still believes more research is required to unearth the several causes of corporate collapse.

On the other hand, Akanki[49] submitted that intra- company crisis leading to deadlock results in unresolved and prolonged problems and consequent corporate failures. He supported his position with the judgment of Cozens-Hardy M. R. in **Re Yenidge Tobacco Co. Ltd** [50] that "no matter the business prospects of the company, winding up will be ordered on the just and equitable principle, if it is proved that the business can no longer be run harmoniously, which of course must be based on complete irresolvable matters. Even though these articles were written at the time when the current company law was

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48. See Akume A.A Ibid P. 45 -46; See also A. A. Akume, "Predicting Corporate Collapse in Nigeria" Modus International: Law and Business quarterly Vol. 4. No. 2 1999, P. 43 – 45 (particularly P. 45).

49 See Akanki, E. O (Supra) P. 110-120; See Akanki; E. O "Negligent Management by Company Directors' (1975) 9 NLJ 47

50. (1916) 2 Ch. 426 P. 430

non-existent, it is submitted that most complete and irresolvable matters in modern company management are largely the result of conflict of interest of directors in the discharge of their fiduciary duties.

The Nigerian Companies and allied Matters Act of 2004[51] in its section 281 provides that:

> "The fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company including a duty not to use the property, opportunity or information obtained in the course of the management of one company for the benefit of the other company, or to his own or other person's advantage".

Under section 282{1} it is provided that:

> "Every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interest of the company, and shall exercise that degree of care, diligence and skill which a reasonable prudent director would exercise in comparable circumstances"[52]

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51. *See generally CAMA, LFN 2004*
52. *CAMA, 2004*

Section 282{2} and {3}[53] which provide for liability of directors in the event of breach of duties imposed by law is not adequate to deter a person holding multiple appointments to derogate from abuse of the fiduciary duties imposed on him by virtue of his multiple and interlocking appointment. The abuses of the fiduciary duties ranges from disloyalty, display of lack of good faith, insider abuse, destruction of sound judgment and inefficiency.

The CAMA by provision of the section. 281 recognizes the concept of interlocking/multiple directorship. The provision corresponds to section 191 of Article 78 of Table A, first schedule of the Companies Act of 1968 which allows a person to hold more than one directorship. The section did not put limit on the number of directorship of companies an individual can hold. This seems to be similar with the English Act of 1985, [54] except that, that Act provides for full disclosure of such appointments.

It is to be noted that multiple directorship places undue burden and hardship on the efficient carrying out of the fiduciary duties of directors. The provisions of

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53. CAMA, 2004
54. See S. 288 of English Companies Act, 1985

the act are rather too generous and are also not explicit or rather taken
into account the effect of such practice on the management of the companies.

In Nigeria, there has been a clamor for good corporate governance regime because of stakeholders increasing dissatisfaction with the activities of Boards of many companies. This development prompted Securities and Exchange Commission {SEC}[55] to constitute and inaugurate the committee on Corporate Governance in 2002.[56]

The code produced by the committee provides rules for the conduct of the affairs of a company by directors and all other stakeholders and to guide regulators of corporate bodies in taking decision.

The code specified the type of conduct and governance required of directors and management team of companies and corporations towards ensuring efficient and good governance, corporate fairness, transparency and accountability so as to bring about a healthier control and

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55. ***Securities and Exchange Commission established by Investment & Securities Act, No. 29, 2007 {SEC}, (Formerly Act No. 45, 1999).***

56. ***See Peterside's Committee on Corporate Governance Code inaugurated by SEC, in June 2002. The Committee in October 2003 produces the "Code of Best Practices on Corporate Governance of Public Companies in Nigeria".***

management in the corporate industry especially in this era of economic globalization.

One major missing link in the code is that its operation seems to be limited to public companies only which fall within the regulatory purview of the commission, to the exclusion of private companies. Interestingly, the code failed to provide for a situation where a person has to be on the boards of two or more companies, a practice which has produced serious negative effects resulting in poor management and collapse of many erstwhile booming companies and corporations in Nigeria.

Similarly, the Central Bank of Nigeria saw the same danger and decided to come up with corporate governance code for Banks and Other Financial Institutions.[57] The

code specifies the conduct and operational standard required of banks and financial institutions in the finance industry. Part 1 section 2 (2) and (3) of the code deals with weakness in the corporate governance of the financial institutions and challenges facing them while part 11, sections (4) and (5) deals with the best practices required.[58]

Just like the SEC code, it did not identify the practice of interlocking directorship as a major cause of management

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57. *See Central Bank of Nigeria, "Code of Corporate Governance for Banks in Nigeria Post Consolidation" March, 2006*
58 *Ibid P. 4 -15*

problems in the banking sector even when it referredto the boards of these financial institutions as being based on family ties and class connections.

Under section 5,[59] it nearly addressed the issue when it referred to the evils of executive duality and sought to prohibit the practice of combining the post of chairman and chief executive officers, and the prohibition of the same family members from being chairman and Managing Director and Chief Executive Officer and Executive Directors of banks and other financial institution falling within is regulatory jurisdiction. The effect was that provisions the were not made in the code against the necessary evils of the practice which is negatively affecting the sector in particular and the Nigerian economy as whole.

Finally, this work excludes holding companies, which do not normally owe any fiduciary duty of loyalty and good faith to its subsidiaries even when the subsidiary has an independent Board. The exclusion is because the directors of their subsidiary companies cannot be independent or act independently from the Holding Company. Their breach of duties may not attract any penalty or liability because

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59. *Ibid P. 11-15*

any harm done is self-inflicted.[60]

From the foregoing, the concept of corporate governance and interlocking and multiple directorships are inter-related and this impact negatively or positively on each other. Despite this inter-relation, all the learned authors and jurist as well as the legislations and regulations that have been discussed above have not shown the danger or otherwise of the practice of interlocking directorate and multiple directorships in corporate governance.

Therefore, in Nigeria where there has been a cry for good corporate governance regime, because of the negative activities of members of directors of company boards, a greater caution ought to have been taken before allowing such practice under our company laws and administration in view of its far-reaching implications on corporate governance. It is the necessary evils associated with the concept, that has globally brought paradigm shift from a mere corporate management and control to efficient and effective corporate governance.

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60. ***See Olawonyin, G. A. Status and Duties of Company Directors (supra) P. 43. See also Unit Construction Co. Ltd –v- Bullock (1959) 3 AllER 831 WLR 1022. (1960) AC 35 where the court held an English company's wholly owned subsidiaries in Kenya to be resident in United Kingdom because the actual control of their management was by the board of the English Company based in United Kingdom. See also Lindgren –v- L&P Estates Ltd (1968) 1AllER 912, (1968) 2 WLR 562 P.570-571.***

1.7 Justification/Significance Of The Study

This research has established that the changing practice of company shareholders and other stakeholders in Nigeria and the evolution of more enlightened society have led to increasing dissatisfaction with the activities of board of directors in the management and control of companies.

This research work is therefore useful to a wide spread of promoters of companies and investors {local and foreign} and the corporate industry which would require effective, efficient and transparent good corporate governance of their business and investments.

The work is also very useful to the government and regulators of the industry sector by alerting them on the dangers and evils of interlocking directorship or otherwise and thus assist them to come up with policies and reforms for good corporate governance and a healthier and efficient use of managerial resources.

Finally, the research will serve as literature to teachers and students of law, corporate legal practitioners and all other stakeholders who have interest in the dynamics of modern company law practice of which the watchword is healthier and efficient corporate management.

1.8 Methodology of Research

The research method used is doctrinal research based on

available literature, laws, statutes and decided cases journals, seminar workshop papers and other relevant materials on the subject matter in the library.

The law and legislative provisions as well as the work of some learned researches and authors consulted are critically reviewed and analysed in view of paucity of judicial decision on the subject in our jurisdiction to enable proper understanding of the concept and its effect on corporate management in Nigeria.

The effects or consequences therein are identified and suggestions and recommendations for reform that will address the endemic phenomenon of corporate failures and collapses now a feature of Nigeria's corporate sector made.

1.9 Organizational Layout

The thesis is divided into six chapters. Chapter one features the introduction which deals with the conceptual definitions of interlocking directorships and corporate governance and their inter – relationship. The distinction between the concepts is examined to show the basis for this research work.

Chapter two deals with the perspective/phenomenon of multiple directorship generally. The various models of interlock are examined in this chapter include the model

prevalent in Nigeria's corporate industry and determine what effect interlock will have in the circumstances.

The third chapter looks at interlock and fiduciary duties of directors, while chapter 4 specifically looks at the duties of care and skill, honesty and good faith and issues of conflict of interest in the course of performance of directorial duties.

Chapter five looks at the consequences dimensions and effect of the concept of multiple directorships in modern corporate management and practice. It looks at the judicial attitude towards the activities of such directors on company board to ensure effective corporate governance legal framework generally and in Nigeria in particular.

The last chapter (i.e Chapter 6), is the concluding part. It encompasses assessments of the fiduciary obligations as well as useful suggestions and recommendations, where necessary, for corporate promoters and investors alike, government agencies and concluding remark.

KASHIM IBRAHIM

CHAPTER TWO

THEORETICAL MODELS OF INTERLOCKING DIRECTORSHIP

2.1 Introduction:

The fact that a company is an artificial entity or person means that it can only act through the agency of a natural person. Accordingly, those primarily entrusted with the management of a company are its directors. Hence the concept of directors as organs of their companies which has been expressly extended to concern anyone who is considered to be a responsible officer of the company.

The organic concepts are developed mostly from cases under the English Merchant Shipping Act of 1894. The most important of the case is that of **Lennard's carrying Co. Ltd -v- Asiatic Petroleum Co. Ltd**[1]**.** In that case, a cargo of bensine on boardship was lost by fire caused by unseaworthiness of a ship with defective boilers. The ship-owners and the Managing owners were two limited companies. Mr. Lennard, Managing Director of the latter company knew or had the means of knowing about the defective condition of the boilers, but gave no special instructions, to the captain or chief engineer of the ship regarding their supervision nor did he take any step to prevent the ship putting to sea with defective boilers.

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1. (1915) AC 705

The issue was whether the loss suffered by the plaintiff had occurred "without the actual fault or privity" of the defendant company, within the meaning of section 502{1} of the English Merchant Shipping Act 1894.[2]

The House of Lords in rejecting the argument of the defendant company that it had no actual fault or privity held the defendant liable on the ground that Lennard's acts were those of the company itself. Viscount Haldane, L. C. in a memorable judgment said as follows:

> "My lords, a Corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation, that person may be under the direction of the shareholders in general meeting; that person maybe the board of directors itself .... if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of section

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2. ***The equivalent is Nigeria Merchant Shipping Act, 1962. Section 338 and 383***

502. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing of respondent supervisor, but somebody for whom the company is liable because his action is the very action of the company itself".[3]

Directors are thus the primary organ of the company and are capable of exercising all its given powers on its behalf.[4] They are given control of the company's affairs and property. Their position at times, in fact exceeds that of ordinary agents.[5]

In recent time, the global economy has witnessed the growing ascendancy of Managerial power over financial power in economic life. The direct consequence of the growth in managerial power has been the uneasiness being felt by company promoters, lawyers and others concerned at the increasing abuse of power by directors and holders

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3. *Ibid P. 713*
4. ***See Daimler Co. Ltd-v – Continental Trye and Rubber Co. Ltd (1916) AC 307 at pp. 340 see also Ibadan City Council. V. Odukale {unreported suit Judgment No CAW /102/68 of 30 /4/ 1969. – Nigeria supreme court approved the judgment on further appeal to it in 1972 Per Udo Udoma, JSC {1972} 7 SC 128 at pp 146 – 147. See also G.A Olawoyin (supra) PP. 17 - 18***
5. ***See Automatic Self-Cleaning Filter Syndicate Company Ltd – V – Cunningham {1906} 2 Ch. 34.) See also Olawoyin (supra) P. 23.***

of managerial posts. These directors are often so entrenched in their positions such that it even makes their removal a fairly remote possibility.

Thus, today, within the normal scope of everyday duties the position of company directors is rather very strong. This perceived position of directors and its implication for corporate industry and investors notwithstanding, the Nigeria company legislation[6] has made a provision allowing multiple directorship[7] in companies.

2.2 Interlocking Directorates And Multiple Directorships

To understand the concept of multiple directorships, which has found its way into the body of our company legislation, there is the need to know the theoretical nature of how they operate and their inter-relationship and effects on Nigeria's Corporate Industry.

Interlocking directorship can occur either directly or indirectly. Direct interlock is where an individual is a director on the board of two different companies. This is the strongest and most readily discernible form of interlock. An interlock is indirect if two companies with no common directors are linked through another

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6. *CAMA, Cap, 120, LFN 2004*
7. *See CAMA S. 281*

company or group of companies with whom they share directors.[8]

For instance, it is assumed that this type of interlock, there is a chain of connection where XYZ Ltd and ABC Ltd are interlocked with DEF Ltd and DEF with GHJ Ltd and so on. This could even lead to a more complex situation if company GHJ Ltd is linked with BCY Ltd and DEF Ltd is again linked with ABC Ltd.

The above two scenarios would show that such indirect interlock could either be vertical or horizontal based on its direction. If two or more companies that deal with each other as supplier and customer share a director, it is vertical interlock.

Practical example of this type are the defunct Nigerian American Merchant Bank Ltd and Enpee Industries Plc {both in the banker and customer relationship} having a common Chairman on their Boards and Golden Guinea Breweries Plc and IMB {Merchant Banker} Plc, with

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8. ***See also Idonigie, P. O. "Interlocking Directorates and Corporate Governance", International Business Lawyer, Vol.32 No. 3 (20040 P. 75; See also Skinner, D "Unlocking the Interlocks: Common Law Fiduciary Duties and the Phenomenon of Interlocking Directorates in the Common Wealth Caribbean" 3 Journal of Transnational Law & Policy, Vol. 53, 1994.***

some common directors. In essence a detailed examination of most Nigerian Companies be they public or private will show existence of ties in the composition of directors on their boards. Apart from the above companies, others such as the defunct Alpha Merchant Bank Ltd, which collapsed in the 90's, Afribank Nig. Plc; Union Bank of Nigeria Plc, the Dangote Group seem to share vertical interlock[9].

Finally, there is also a central or symbolic interlock when companies that have complimentary services are linked together.[10]

Since the existence of corporate governance lies in the questions, who controls the companies and what is the nature and extent of their duties,[11] the concept of multiple directorship will thus involve the analysis and examination of the various models or perspective of interlocking directorate and how in corporate governance it affects the directors fiduciary duties of loyalty and good faith to the different companies he/she serves on their boards.

2.3 The Management Control Model

The first model of interlocking directorate is the

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9. ***Archives of Securities and Exchange Commission (SEC).***
10. ***See Pennings, S. M. "Interlocking Directorates: Origins and Consequences of Connections, Among Organizational Boards of Directors (1980) P. cited in Skinner D. Op. Cit P.8.***
11. ***For the concept of directors as organs of their companies See Daimler Co .Ltd –V- Continental Trye & Rubber Co Ltd (Supra).***

"Management Control" model.[12] In this model, the centre of corporate power and control lies with the management team of the company. The impact of interlock is not too significant since in practice the boards defer power and control to the direction and judgment of the management team.

The model assumes that non-executive directors are appointed mainly to provide the company with external view and opinions and valuable commercial and financial contracts, prestige and influence.

In Nigeria, this practice is exemplified by the appointment of influential people who have served government and have risen to higher levels, on the boards of several companies. This is seen among the cream of retired army generals, ministers and super permanent secretaries and our revered royal fathers whose names are found on the board of several companies. Their names serve as a prestige and influence booster for financial contracts, and in the financial services sector, for cash deposit mobilization.

The fact is that, in companies and corporations where there are executive directors who are involved and also in charge of their day-to-day administration and

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12. ***See Koenig T. et al. "Models of the Significance of Interlocking Corporate Directorates. 38 AM Journal. Of ECON & SOC. {1979} 173***

management, such executive directors have access to insider information and have full time control over the strategies and operations of the companies.

The result in this situation is that the impact of the non-executive or part-time directors is minimally felt in the management of a company[13].

The non-executive directors where they are managerial or specialists in areas such as law, accounting, economics and management only bring their experience and exposure to bear in the management of the company.

In any case, the realization by the executive management team called executive directors that the non-executive or part-time directors are also members of the board serves as a balancing factor and thus ensures stability and effective as well as efficient management and accountability in the companies.

2.4 The Reciprocity Model

The reciprocity model or otherwise sometimes referred to as "inter-organizational elite model"[14] of interlock postulates a situation where two or more corporations

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13. ***See Paul R. E. and Winkler, J. T. "The Economic Elite: Theory and Practice" in Stanworth P. and Giddens A. {Eds} Elites and Power in British Society (1974)***
14. ***See Allen M. P. "The Structure of Inter -organizing Elite Corporation"39 AM SOC. REV. {1974}, 393.***

cooperate with one another for mutual benefit[15]. The model depicts the corporate sector as being structured in groups of coordinated companies with each group subject to a specific sphere of control.

In this model, the inter directorial links facilitate cartelization, the practice of agreement and consensus on price fixings, squeezing out of competitors, buy outs and control of supplies and market shares. The cartels is analogous to the classic economic theory of monopolist with segregated markets[16].

This category of interlocks are used as a" corporate co-op" to control the relationship of interlocked entities' interest, while coordinating strategies to address exogenous contingencies and main management control[17].

Interlocking directorship routed in this model will today be anti-globalization, liberalization and competition and thus would be unhealthy for any economy especially Nigerian and the 3rd world countries or developing economy.

.5 The " Finance Control" Model

The finance control model is an off-spring of the matrix

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15. *See Koeing, T, Et al. Op. Cit*

16. *See Dooley P. C. "The Interlocking Directorate" 59 AM ECON REV. 314 See also Stockman, F. N, Et al, Networks of Corporate Power {1985} cited in Skinner, D. {Op. Cit}.P. 8*

17. *See generally Allen, M. P. {Op.Cit}.*

economic theories. The model explains interlock as symptomatic of the efforts of financial institutions and big investments companies and corporations to monitor and control the objects of their investments and to manipulate company behaviors.[18]

Financial institutions in particular are seen as the main source and center of corporate interlocks in this case. A good example of this scenario is where banks and other financial institutions and organization that are providers of funds ensure that they are on the boards of companies in which they have invested huge sums of money. Practical example of this model are the representation of defunct international Merchant Bank Plc (IMB) on the board of Golden Guinea Breweries; Afribank Nig Plc on the board of African Plc (AP Plc) and the chairman of the defunct Nigerian American Merchant Bank Ltd (NAMBL) being chairman of Enpee Industries Plc to mention a few. The model is therefore a common phenomenon in Nigeria.

In situations such as this, one such director from a bank can represent the bank in more than one company.

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18. ***See Allen M. P. "The Structure of Interroganising Elite Corporation "39, Am SOC. Rev. (1974), 393 and Koeing T. et. el. "Models of the Significance of Interlocking Corporate Directorate. 38 AM Journal of ECONS & SOC (1979), 173***

The irony of it is that as these big companies rely on the financial institutions, to support their activities, so they lose their independence in the process. For instance, by electing a banker to a company's board of directors, the board of the company has higher chance of enjoying a ready access to the bank's funds. The presence of the bank's representative as a director on the board enables the bank to watch over the operations of the company thus reducing the risk of lending to a distressed borrower.[19]

At common law, this model has been given legal recognition **in Re Bulawayo Market and Office Co**.[20] where it was held that there is nothing in law, which prevents a company from being a director of another company.

However, this position was criticized in Jenkins' report where it was described as making nonsense of the idea of fiduciary duties of dircetors[21]. It would however, appear that the criticism in Jenkins' report holds no water today. This is in view of the fact that the device of appointing

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19. *See Mintz, B and Schwartz M., "The Structure of Interlocking Unity in American Business". 29 SOC. PROBS {1981} P 87; Taicli, Y. F.., "Banks and Corporate Lending: An Analysis of the Impact of the Internal Structure of the Capitalist Class on Lending Behavior of Banks", 45 AM SOC Rev. {1980} P. 553; See also Dooley P. C. (Supra) P. 317 -318;*
20. *(1901} 2 Ch. 458.*
21. *Jerkin's Report is the Minutes Of Evidence Taken Before the {English} Company Law Committee in 1962.*

institutions and corporation as directors has been given legal/statutory recognition, as exemplified in the case of **Re Bulawayo Market and Office Co.**[22]

In suffices to note that this practice in question has been adopted where a parent company is desirous of keeping absolute control of its subsidiaries or used merely to check the identity of the actual controllers of the company. This therefore, seems to explain the rationale for the provision of section. 281[23] which permits multiple directorships under Nigerian Companies and Allied Matters Act.

2.6 The " Class Hegemony" Model

The "class hegemony" as model of interlocking directorates assumes that cohesive elite controls the ownership of dominant corporations in all industries.[24] The elites perpetuate its class hegemony by maintaining consensus and commitment through directorial and social ties. While these social networks of kinship, elites, business and family ties can exist with or without interlocking directorates, the phenomenon of interlock is a sturdy economic pillow for this model

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22. *(1901) 2 Ch. 458 (supra).*
23 *See CAMA* **bid**
24. *See generally, Allen, M .P. (Supra); Koeing, T. et. el, (Supra) and Dooley P.C (Supra).*

Therefore, they are bounds of capital, commercial and personal relations. The manifestation are seen among the prestigious scholastic education and membership of exclusive clubs such as Rotary, Armoc, Lions, Polo, Golf clubs and inter- marriages. The directors are appointed based on their personal relationship with the stakeholders of the company.

They are not appointed for their ability to challenge meaningful professional and ethical contribution to the growth or benefit of the company. They are chosen more often for their business or personal ties or for their ability to add symbolic luster.

Typical of this model is that the class generally provides the ancillary benefit of consolidating and perpetrating economic power, thereby strengthening the class hegemony and cohesion[25].

This model of interlock is very prevalent in Nigeria as the directorships of most companies are appointed based on class hegemony. It is a fact that the Abiolas, the Ibrus, the Edewors, the Otumba Balaguns, the Iwanyanwus, the Igbinedions, the Dankabos, the Chachangies, the

25. ***See Parris, C, "Power and Privileges in Trinidad and Tobago" Social and Economic Studies (1985) P. 97*** 34

Dangotes,the Dantatas, the Folawiyos, the Okoya Thomas, Adenugas and Otedolas of Nigeria are all in this category.

Similarly, the various inter-tribal marriages and family ties especially between the off-springs of traditional chiefs and other business tycoons and captains of industries are symptomatic and manifestations of this models of interlocking directorship.

2.7 Conclusion

In conclusion, the foregoing analysis shows that multiple directorship evolved from various perspectives. It further shows that, be it managerialist or reciprocity, finance or class hegemony models as variously described, it has one motive, which is protection of the financial or investment interest of those on whose behalf a director holds multiple directorship on company boards.

This again accounts for reason why the Nigerian Law Reform Commission could not categorically condemn it but rather advocate a detailed procedural legislation that will ensure loyalty and good faith from the directors. Hence the endorsement and consequent provision in the

Company's Act,[26] allowing multiple directorship without more.

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*26. **Section 281. See CAMA.***

Therefore, since the principle of interlocking directorship has been brought in and made part of our modern company management practice and administration, it has become imperative to also look at its effect or otherwise vis-a vis the fiduciary duties, these directors owe to the companies they serve on their boards. This is because, giving whatever reason for appointment of directors, the law has recognized the supremacy of the board of directors of companies and corporations. It thus follows that such appointment must act within the bounds of the legal and ethical standards. The standard must be reflected in the performance of their duties, which include the fiduciary duties of care and skill, trust, loyalty and good faith as well as legitimacy in the discharge of their required role of strategic thinking, management supervision, ensuring accountability and policy formulation.

CHAPTER THREE

FIDUCARY DUTIES OF DIRECTOR

3.1 Introduction

The company as an artificial entity or person acts through agency of natural persons who are entrusted with the management of its affairs. In corporate business, those in charge of the management are the directors who are the organs of the company. This board of directors is usually charged with the responsibility of running the business and affairs of the company.

Section 244(1) of Company and Allied Matter Act,[1] provides that the term "director" of a company could be defined as a person appointed or elected according to the law authorized to manage or direct the affairs of a corporation or company. In **Olufosoye –v- Fakorede**[2] where the issue of who manages the company arose, it was held that by section 244(1) of CAMA, the management of a company is the collective duty of the board of directors of the company.

Since they represent the organ of the company, they

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1. *CAMA Cap 120 LFN 2004*
2. *(1993) 1NWLR (Pt 272) 747, P. 764, See also ACB Plc –v- Haston (Nig) Ltd (1997) 8 NWLR (Pt 515 110)*

occupy a fiduciary position in respect of their company. The issue then is what sort of fiduciary is a director to his company. This question will lead to other questions such as to who is he a fiduciary and what are the obligations and duties the director owes as a fiduciary[3]. It is thus, important to examine the status of directors of companies to determine the basis or the evolution of the directors' fiduciary relationship so as to able to appraise the effect of interlocking or multiple directorships in company management.

3.2. The Status of Directors under Common Law

In most common law jurisdictions, the status of a director has been subjected to a lot of judicial pronouncements. For instance, the director has been described as controller of the company's affair,[4] this seems to be borne out of the fact that the director is entrusted with the management of the company on behalf of the stakeholders. As the primary organ of the company, they control the company affairs and its property.[5]

It will be submitted here that if the directors can exercise

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3. *See generally the judgment of Frankfurter J. in the American case of SEC –V- Chenney Corporation 318 US 80 {1866} 8 Ch. App 77. See also Wilmot –V- London Celluloid Co {1866} 34 Ch. D147*
4 *See McCardie J. in Moriaty –V- Regent Garage and Engineering Co. Ltd {1921} 1KB 423, P. 446*
5 *See Lord Parker in Daimler and Co. Ltd-v- Continental Trye 7 Rubber (GB) Ltd.(1916) 2 AC 307 P. 340.*

power of control over the company's property and affair, then its position in fact exceed that of agent or trustees.

In another development, the director has been described as a servant or employee of the company.[6] But whether a director can properly be regarded as a servant or an employee in his company should be determined not much in relation to the duties of directors of the company, but more in relation to the rights of the employee. Such rights include rights relating to payment of salaries, compensation to the officials of the company for loss of office in the event of winding up of the company and the likes.

In **Hutton. V. West Cork Railway Co**.[7] where the issue relates to compensation for workers following sale of the company's undertakings to another company, it was said that a director is not a servant of the company and was therefore not entitled to payment of compensation.

It is however, submitted that this would not rule out that in other capacities the director could be a servant. In **Re Beeton and Co**[8]. The court Per Neville J. pointed out that there was nothing which prevents a director of a company

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6. *See Lee –V- Lee Air Farming Ltd {1960} 3 AllER 420; see also Lever Brothers Ltd-V- Bell {1932} 1 KB 557*
7. *{1883} 23 Ch. D. 654. See also Normandy –V- Industrial Coop & Co. {1890} 1 Ch 84; Re Beeton & Co. {1931} 2 Ch. 279*
8. *{1931} 2 Ch. 279, P. 285.*

for being a servant of the same company in other capacity. In that case, it was decided that a director does not fall within the category of clerk, or servant of a company within the meaning of section 209 {1} of the English Companies Act, 1908.

The dictum of Neville J. has found its support in that in the more recent past there has been a gradual acceptance of directors as servants or employees of their companies. For instance, Cohen J., in **Trussed Steel Concrete Co. Ltd. V. Green**[9] conceded to defendant's argument that he could be regarded as an employee of his company even though he was the Managing Director.

The facts are that in an agreement dated March 25, 1936, the defendant was appointed Managing director of the Plaintiff company for a period of seven years, until January 1, 1943. One of the clauses of the agreement provided that "during the continuance of the agreement, Mr. Green shall devote his whole time and attention to his duties as Managing director and shall in all respects conform to and comply with the directions given and regulation made by the board of the company and shall do all in his power to promote, develop and extend the business of the company and shall not without the consent of the company during such continuance directly or

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9. {1946} 1 Ch. 115

ir directly engage or be concerned or interested in any other business of any kind whatsoever".

The agreement was later extended to cover the duration of the war unless it was determined by either party giving six months notice in writing to the other. In 1944, the British Minister of Labour and National Service certified that the company was carrying on a schedule undertaking at various addresses where its head office and works were situated and the company became subject to the Essential Work {General Provisions.} {No. 2}, order 1942. In November, 1945 Mr. Green was dismissed from the office of the managing director by the board of directors. He claimed and argued that, being one of those persons protected by the regulations of the Minister, he could not be dismissed without the Minister's consent. Though it was decided that he could be dismissed without the consent of the minister, the judge conceded that he might be regarded as an employee though he was the managing director.

The learned Justice Cohen made the following remarks

> "When I find a man who is bound to devote his whole time to the affairs of the company, to do all in his power to develop and extend the business of the company, not to engage in any other business and who is engaged on the terms that his employment

> may be determined by the company by notice in writing, I find it impossible to say that he is not employed by the company"[10].

It is therefore respectfully submitted in this thesis that the provision in the director's service agreement, the nature of the duties performed by a company director, as well as the amount of time he devotes to the affairs of the company, should be the decisive factors in considering whether or not he is a servant or employee of his company.

While some look at directors as servants or employees, others see them as "organ or alter ego"[11] of the company. The development of this concept is related to the quest by the courts to find a solution to the problem of determing where lies the corporate criminal and civil responsibility for offences under criminal law, tort and other wrongs and offences which require personal culpability before liabilities are imposed.[12]

The common Law courts set out to provide solution by treating the decision of the majority of the members of

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10. *Ibid, p121. See also Anderson –V- James Sutherland {peterhead} Ltd {1941} Sc 203 and the decision of English Court of Appeal in Boulting –v- ACTAT (1963) 2 QB. 606*
11. *See Lord Parker in Daimler &Co. Ltd –V- Continental Rubber & Tyre (GB) Ltd. (supra).*
12. *See C.R.N Win "The Criminal Responsibility of Corporations" {1928} Cam. LJ. 398; R.S Welsh, "The Criminal Responsibility of corporations"{1946} 62 LQR 345; LH eigh "The Criminal Liability of Corporations under English Law {1969} see Generally Gower; Modern Company Law, Chapter 7& 8. See also the Nigerian case of Mandilas Karabaris Ltd and Another –V- Commissioner of Police {Western Region{1958} WNLR. 147*

the company at a general meeting as the decision or acts of the company itself. In the common Law case of **Attorney General V. Dary**[13] where the question was whether two of the three members of the corporation were right in choosing a chaplain in the face of opposition from the third member, it was held that the actions of the majority were in order. Lord Hardwicke L. C. in his judgment reasoned that "It cannot be disputed that wherever a certain number are incorporated a major part of them may do a corporate act. so if all are summoned and part appears, a major part of those that appear may do a corporate act..... it is not necessary that every corporate act shall be under the seal of the corporation".

What is being said is that it is within the power of the majority of members of a company present at a particular meeting of that company to act not only on behalf of the company but also for the company. The majority in this case was therefore regarded as the organ, or alter ego of the company and their actions were regarded to be of the company.

At the beginning of the 20th century, came a departure from this principle in that, there is a delegation of power to the board of directors. This gave the board the exclusive right to exercise those powers and the members were no

13. *{1941} 2 ATK 212.*

more competent to override their decisions. However, it is to be noted that this is however subject to any residual power which may be vested in the general meeting by statute or company regulation.[14]

The Principle of directors being the organ and alter ego was given prominence in the case of **Automatic Self-Cleaning Filter Syndicate Co. V. Cunningham**[15] where Cozens Hardy L.J. raises the interesting and important question that set the Law in a new direction.

The facts of the case are that a company had power under its memorandum of association to sell its undertaking to another company having similar objects. By its Articles of Association, the general management and control of the company were vested in the directors, and, in particular, the directors were empowered to sell or otherwise deal, with any property of the company on such terms as they may think fit. At a general meeting of the company, a resolution was passed by a simple majority of the shareholders for the sale of the company's assets to another company formed for the purpose of acquiring them, and directing the directors to carry out the sale.

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14. See generally the judgment of Plowman J. in the case of Bamford –v- Bamford {1968} 2 All ER 655; {1968} 3 WLR 317.

15. (1906) 2 Ch. 34, see also the judgment of Fletcher-Moulton, LJ AT p. 105 OF THE judgment in the case of Gramaphone & Typewriter Ltd –V- Stanly (1908) 2 KB 89, and Buckley LJ at P. 98 Ibid.

The directors, who thought that the proposed sale was not in the interests of the company, declined to carry out the sale. The Court of Appeal upheld their refusal to carry out the sale and held that the resolution of the general meeting that gave the direction was a nullity.

By the decision of the Court of Appeal therefore, where the management of a company is vested in the directors and they act within the powers given to them by the regulation of the company, any resolution passed by the company at a general meeting will not be binding and can thus be ignored by the directors. This however is sustainable only where there is specific delegation of power given to the directors. If delegation is in general form, the decision would have been otherwise. Thus in the case of **Marshalls Valve Gear Co. V. Manning Wardle & Co**[16] where a director who held majority shares commenced action in the name of the company against his other three co-directors, and those three co- directors, moved to object to the action on the ground that the company's name was being used without authority, and the director's powers were governed by Article 55 schedule one of the English companies Act, 1862, Neville J. dismissed their objection on the ground that the control was in the hands of the majority of the shareholders.

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16. {1909} 1 Ch 267

To Professor Gower[17] this decision was in conflict with the judgment of Cozen Hardy LJ in the case of **Automatic Self Cleaning Filter Syndicate Co. –V- Cunningham.**[18]

However, professor Gower recently come to agree that there was no conflict as Marshall's case[19] is explicable on the ground of peculiar circumstance whereby the directors wanted to use their power to prevent action being brought by their company to remedy an apparent breach of their duty.[20]

The recognition of the board of directors as the organ or alter ego of the company not subordinated to the general meeting of the shareholders in respect of powers invested by the company regulation was given prominence in the case of **John Shaw & sons {Salford} Ltd -v-Shaw**.[21] In that case, the directors of a company commenced an action on behalf of the company and the shareholders at a general meeting resolved against the continuation of the action by the directors. The question was, inter alia, whether the resolution was in order.

In that case, Lord Justice Greer put seal on the position of directors vis- a- vis the general meeting of the

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17. *See Gower Modern Company Law {2nd Ed. 1957} p. 121 -122.*
18. *(1909) 2 Ch. 34 (supra).*
19. *(1909) 1 Ch. 267 (supra).*
20. *See Gower, Modern Company Law, {3rd Ed. 1969} p. 133 {note 53}. And recently (8th Ed) 2008 P. 369 -370 {note 14 -3}*
21. *{1935} 2 KB 113; See Scott –V- Scott {1943} 1 AllER 582, P. 585*

company by his following declaration:-

> "A company is an entity distinct, alike, from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the article in the Directors is by altering their articles. They cannot themselves usurp the powers vested by the articles in the general body of shareholders"[22]

The above cases have clearly establish that, in the description of directors as organ and alter ego of the company, the powers vested in the directors by the company regulation is the same as the powers possessed by the general meeting as an organ of the company.

It is thus submitted that the modern rule is that under an Articles of Association of a company, in the term of Table 'A' the members in general meeting cannot give directions on how the company's affairs are to be managed nor can they overrule any decision arrived at by the

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22. *{1935} 2 KB 113, at P. 134*

directors in the conduct of its business. In addition, both the general meeting and the board are organs rather than agents of the company.[23]

The concept of director as organs of their companies has since been extended to cover anyone who is considered to be "a responsible officer" of a company. In the case of **Daimler Co. Ltd .V. Continental Tyre and Rubber (GB) Ltd**[24], Lord Parker said "the acts of a company's organs, its directors, managers, secretary and so forth functioning within the scope of their authority are the company."

In **H.M.S Truculent case**[25] which involves a collision between two ships resulting in the death of over sixty persons, it was held that the Third Sea Lord was the "directing mind" of the Admiralty and that his action was the very action of the Admiralty itself.

In the Nigeria case of ***Ibadan City Council. V. Odukale***[26] the then Western State Court of Appeal held inter alia, that the chairman of Ibadan City Council was an alter ego of the council. Even though the Supreme Court reversed the decision, the apex court positively approved the lower

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23. ***Gower Modern Company Law 3rd Ed. 1969 P. 132; See also Table A of Article 30 of the Companies Act.***
24. ***{1916} 2AC 307 at P. 340***
25. ***{1952} 2 ALL ER 968***
26. ***{1969} Suit No. CAW/102/68 delivered on 30/4/69***

courts view of the alter ego. Udo Udoma, JSC delivering the judgment of the court said as follows:-

> "We consider that the criticism of the Western State Court of Appeal on this aspect of the case in describing chief Akinloye as the alter ego of the committee of the council were unjustified. We are satisfied on critical examination of the evidence and hold that the Western State Court of Appeal came to a right decision when it took the view that the defendant's counsel was answerable for the acts or defaults of its official, Chief Akinloye, and that the latter was the directing mind and will of both the committee and the defendant's counssel".[27]

The extension of the organic theory to cover some officers and other directors of a company was manifested in the case of **The Lady Gwendolen**[28] where an assistant managing director of a shipping company was held by the English Court of Appeal to be an organ of the company.

It is thus submitted that at common law a company could be held liable for actions of any of its officers, who need not be directors, but enjoy a formally delegated authority over some aspect of the company's business on the basis

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27. *{1972} 7SC 128 P. 146- 147*

28. *{1965} 2 All ER 283*

that such actions are those of the company itself. This is however, subject of course, to the exception that the delegation is in fact primary in character.

In the Nigeria case of **Mandilas & Karabaris and another -V- commissioner of Police {Western Region}**[29] the actions of the Branch Manager of a company was held sufficient to render the company liable for fraudulent stealing. From the foregoing, it is submitted that at common law, directors and indeed any other "responsible officer" of a company was regarded as its organ or alter ego and their actions are regarded in a variety of matters as those of the company.

Again, at common law, some schools of thought look at directors as agents. These schools allude to the fact that the very nature of the personality of a corporation makes it necessary for a company to act through the agency of natural persons amongst whom are directors.

But can we properly regard directors as agents of a company or while not being in the position of agents they even resemble agents in any respect?

Common law cases treat directors as agents when dealing with matters connected with their companies, or act on its

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29. ***{1958} WNLR 147. See also CAP 42 LFN; Section 331 and 324 of Criminal Code Law Cap.28 {Laws of Western Region} 1959***

behalf. As far back as the 18th century, Lord Hardwicke in the case of **Charitable Corporation -V- Sutton**[30] referred to directors as "most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affair of the corporation".

This position was further given impetus in the case of **Ferguson - V- Wilson.**[31] In that case, Cairns L.J while answering a question he put to himself with regard to the position of a director of a company he declared as follows:

> "The company itself cannot act in its own person, for it has no person; it can only act through directors and the case is as regards those directors, merely the ordinary case of principal and agent. Whenever an agent is liable those directors would be liable where the liability would attach to the principal and the principal only the liability is the liability of the company".[32]

The above decisions seem to represent the common law position[33] which regard directors as agents of a company.

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30. *{1742} 2 Atk 400. P 405*
31 *{1866} LR2 Ch. 77*
32. *Ibid P. 89 -90 See also Smith –V- Anderson {1880} 15 ChD 247. PP 276 -280; Parker –V- Mckena {1874} L.R.10 Ch. App. 96, PP 118, 124-125 Lagunas Nitrate Co.-v- Lagunas Syndicate {1899} 2 Ch 392 P. 434*
33. *See C.R.N Winn" The Criminal Responsibility of Corporations" {1929} 3 Camb. L.J.P.398 (supra)*

This can be contrasted with the decision in the American case of **Bissell -V- Michigan Southern R.R**[34] where Comstock L. J denied that directors are agents of its company. The learned jurist said as follows: -

> "These corporation had boards of director in whom were vested every power faculty or function which belong to the bodies they represented. We have then no question in the law of agency, for the agents, if that be the proper terms, had all the powers of the principals. Indeed in an important sense they were the principals".[35]

Whichever way the position of directors is looked, the more acceptable view, is that expressed by Bowen LJ in the **Re Imperial Hydropathic Hotel Co.**[36] The learned Lord Justice said as follows: -

> "When persons who are directors of a company are from time to time spoken of by judges as agents, trustees or managing partners of the company, it is essential to recollect that such expression are used not as exhaustive of the powers or responsibilities of these persons, but only indicating useful points of view from which they may for the moment and for the particular purpose be considered points of view at

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34. 22 N.Y L.J P/ 267
35. Ibid.
36. (1882) 23 Ch. D1

> which they seem for the moment to be either cutting the circle or falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment, to observe that they fall Pro tanto within the principles which govern that particular class..... Directors are thus not exactly agents nor exactly servants, perhaps not servants at all – nor exactly trustee, nor is exactly managing partners, if by that is meant that they are nothing more and nothing less".[37]

It is therefore respectfully submitted that under common law, the true relationship between a company and its directors is neither that of principal and agent, nor that of master and servant, nor that of cestui que trust and trustees, but that in some respects, akin to all of them. In terms of relationship, it is sui generic.

The above submission notwithstanding, it is to be quickly noted that there are some situations and areas where directors are agents or their actions, resemble that of ordinary agents. But again, the question is "are directors agents of shareholders". The general rule is that directors are not agents of shareholders of the company.[38]

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37 *Ibid P. 12 -13*

38. ***See Gramaphones & Typewriter** Ltd –V- Stanley {1908} 2 KB 89 P. 106. See also Samon –V- Quins Axtan Ltd {1909} 1 Ch. 311 P. 319*

In **Automatic Self – Cleaning Filter Syndicate Co. –V- Cunningham,**[39] the directors refused to implement the resolution of the general meeting and the shareholders argued that the directors as their agents cannot refuse to obey the direction of their principle. The Court of Appeal, per Collins M.R rejected the argument on the ground that the directors were not the agents of the shareholders and that upon the construction of the articles of the company, the directors could not be compelled to comply with the resolution.

But in **Briess -V- Woolley**[40] the House of Lord held that the managing director of a company, who was authorized by the company in a general meeting to enter into certain transaction was for that purpose the agent of the shareholders. In this case the shareholders were held vicariously liable for the wrong of the managing director.

What this means is that where the shareholders by their action made the directors their agents in respect of a particular transaction, the directors will be treated as their agents.[41] It is therefore respectfully submitted that shareholders will be vicariously liable for cases of fraudulent or tortuous liabilities of the directors actions derive from the company in its general meetings.

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39 {1909} 2 34 Ch. P. 42 -43

40 {1954} AC 33

41. See Allen –V- Hyatt (1914) 3 TLR 444 at P. 445. Per Viscount Holdane L.C

Finally, directors have been described as trustees for the company they represent. In this case, there are conflicting views. Professor Gower[42] in his view referred us to the period before the passing of Joint Stock Companies Act 1844, when these categories of companies were largely unincorporated and the properties of Deed of Settlement companies were vested in trustees, who in most cases are directors of the companies. The court naturally regarded the directors of the deed of settlement companies as trustees, in so far as they dealt with the trust of the company's property.

Cooke,[43] in his discussion of the origins of the modern form of corporations, holds the same view and argue that the three concepts of joint stock, trust and incorporation finally coalesced in the middle of the 19th century to give us the modern form of Company Law. He concluded that directors are therefore the managers or the executives composed of the trustee under the deed of settlement.[44]

Keeton[44] in his own argument also holds the view that in the company formed by deed of settlement, the directors were trustees in the full sense, the firms property being vested in their capacity.

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42. *See Gower Modern Company Law 3rd Ed. 1969, P.515 Para. 48*
43. *Cooke, "Corporations Trust and Company" Manchester (1950) P. 154*
44. *Keeton, "The Director as a Trustee" (1952) 5 CLP 11, P. 13-15; see also Sealy" The Director as a Trustee" (1967) Camb. L.J. 83, P. 84.*

The principle that directors are trustees owes its origin to the case of **Charitable corporation -V-Sutton**[45] where Lord Hardwicke held that the committee men {that is to say, directors} of a chartered corporation, who had misapplied its funds and broken its bye-laws were liable on the footing of trustees for breach of trust, as such committeemen, under deed of settlement, had property vested in them as trustees in the full sense.

But to sealy[46] the view that the concept of directors as trustees arose from the deed of settlement companies was wrong. His reasons were as follows:-

i. That all the earlier cases in which directors, were held liable in trust concerned corporations and not deed of Settlement Companies
ii. That the directors of a deed of Settlement Company were not as a rule the same group of persons as its trustees.
iii. That from directors' obligation, it was not quite apparent that the directors were in fact trustees.

However, it would appear that Sealy's argument that the concept of directors as trustees did not emanate from the deed of settlement companies is not necessarily correct.

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45. (1742) 2 ATK 400
46. See Sealy, "Fiduciary Relationships"(1962) Camb. L.J 69, P 72

In the same vein, the judgment of Lord Harwicke in **Charitable Corporation -V- Sutton**[47] in which he referred to "breach of trust" must have been influenced by the fact that at that time the general method of floating companies was through the deed of settlement.

It has been accepted that the deed did not invariably, but usually vest the property of the company in the directors, but the fact that property was in some cases vested in the directors could have escaped the eye of the judges then. For the judges would have regarded the position of directors as analogues to that of the trustees.[48]

For instance, in the case of **York and North Midland Railway Co. –V- Hudson**[49] the directors of a company had improperly dealt with the funds of the company. Sir John Romily M.R in holding them liable as trustees referred to the office of directors as: -

> an office of trust which if they undertake, it is their duty to perform fully and entirely. A resolution by shareholders, therefore, that the share or any other species of property shall be at the disposal of the directors is a resolution that it shall be at the disposal

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47. *(1742) 2 Atk 400, Supra.*
48. *See generally Olawoyin, G. A. "Status and Duties of Company Directors" University of the Press (New Obafemi Awolowo University), P. 3-5*
49. *(1853) 16 Beau. 485*

of trustee; in others, that the persons entrusted "with that property shall disposed of it, within the scope of the functions delegated to them, in the manner best suited to benefit their cestui que trust".[50]

It is to be noted however, that at this period, it had been greatly realized that directors might infact be guilty of "a breach of trust", without being regarded as trustees in ordinary sense. For instance, in **Guinness -V- Harrison**[51] the directors of a building society who made improper investment of the company money was held liable to the company for committing "a breach of trust" while the trustees of the society were exempted on the bases that they had only acted ministerially on the instruction of the directors.

However, Romer J. has in the case of the Re **City Equitable Fire Insurance Co.**[52] put the true position of director vis –a –vis its description as trustee graphically as follows:

"It has sometimes been said that directors are trustees, if this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true

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50. *Ibid P. 491. See also Smith -V- Anderson (1880) 15 Ch. D. 247 at 280; Ferguson –V- Wilson (1866) L.R 2 Ch. App 77 P. 90 and Great Eastern Rly. Co. –V- Turner (1872) L.R 8 Ch. 149, P. 152*
51. *(1859) 26 Beau. 432*
52. *(1925) 1 Ch. 407*

enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading".[53]

What this means is that while it is true that trustees and directors are "fiduciaries" who have certain obligations towards their beneficiaries, their duties differ in very significant respects even though, they may overlap in some areas.

The position of a director is looked in relation to his company while ordinary trustee is in relation to trust property.

At common law, the trustee owns the property and he deals with it as primary master subject to the equitable obligation to account to some persons who stands in relation of trustee who are Cetui que Trust.[54] On the other hand, the director does not own the property which he has to apply.[55] It is the company that owns the fund and property which are merely under the control of the director. Therefore, directors are trustees in regard to money as assets which come to their hands or which are actually under their control.

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53. *Ibid P. 426*
54. *Per James L.J in smith –V- Anderson (1880) 15 Ch. D. 247 P. 275*
55. *Per Vanghan Willam In Re Kingston Cotton Mills (No. 2) 1 Ch. D 331, P. 345*

It should however be noted that directors are not trustees for individual shareholders. In **Percival -V- Wright**[56] the directors of a company bought shares from some of their members without letting them know that the sale of the company was being negotiated at a price which was likely to increase the value of their shares. In an action for recovery of damages brought by the vendors against the directors who had failed to disclose this vital information, the issue raised was whether a director is a trustee for the individual shareholder in his company. Swinfen Eady J. in his judgment opined that the directors of a company are not trustees of the individual and as such are not obliged to disclose the fact of an imminent take- over bid to them.[57] It is thus respectively submitted that the various descriptions of the position of directors reflects not only the multifarious character of the office but also the changing view of their position. It also point to the fact that the true position of a director may be sui generis in that it neither fits completely with that of an agent, nor that of a trustee, nor of any of the position described above. Hence it was stated by Lord Russell many years ago in

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56. *(1902) 2 Ch. 421*
57. ***See also In Re Exchange Banking Co; Flitcroft's case (1882) 21 Ch. D. 519 P. 534; Denning L.J in Boulton Engineering Co Ltd –v- Graham &Sons (1975) 1 Q.B. 159; Trenco (Nig) Ltd –v- African Real Estate Ltd (1978) 1 LRN 146.***

the case of **Regal {Hasting} Ltd -V-Gulliver**[58] that:

> "Directors of limited company are creatures of status and occupy a position peculiar to themselves. In some respects they resemble trustees, in others they do not. In some respects they resemble managing partners, in others they do not."

By the above proposition Lord Russell seems to have echoed what has been said in **Re Imperial Hydropathic Hotel Co; Black Pool -v- Hampson**.[59]

In that case, Lord Justice Bowen said and I quote:

> "Directors are not exactly agents, nor exactly servants, perhaps not servants at all nor exactly trustees, nor exactly managing partners, if by that, it means that they are nothing more and nothing less".[60]

While one may agree with the common law position that the position of directors closely resemble in many respect, that of an agent, with similarities to those of trustees, employees and others, in the case of service directors, it seems realistic to some extent, to regard employees as director of their companies for some purpose. The concept of directors as organs of their companies seems to be the logical solution to the problem of how to impose liability

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58. {1942} 1 All ER 378 at 387
59. {1882} 23 Ch. D. 1
60. Ibid. P. 12-13

for certain actions on corporate bodies.

However, the truth is that the position of directors under common law is best expressed in the phrase that even though it closely resembles in many respects, that of an agent, and is akin to those of trustees, employees, servants and others, in certain circumstances, directors nevertheless occupy a position which cannot be completely categorized within any other but by reference to the circumstances of each case.

.3 Codification of Status of Directors in Nigeria

The Pre-2004 Nigeria's company Legislation contained no codification or statutory definition of the status of company directors. It is on this basis that professor Olawonyin[61] a learned author on company law said as follows: -

> "Though it is widely recognized that there is both lack of precision in the definition of choice of directors and a failure by many directors to realize that their basic duty is of a fiduciary nature, the codification of directors duties is nevertheless considered impracticable. It can hardly be disputed that the codification of the duties of directors in a

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61. Olawonyi; G. A. Op Cit.

> comprehensive form designed to provide for an exhaustive definition of said duties is likely to produce more evils than cure, since it is not only extremely difficult but practically impossible to enact a code capable of every conceivable set of circumstances."[62]

It is hereby submitted that Olawoyin's statement was based on the enlightened opinion then which is generally against all attempts to produce exhaustive definition of directors' duties mainly because of the difficulties likely to be encountered where such an exercise is to be undertaken. However, the duties of directors today, are partly statutory, partly regulatory and partly dependent on the agents and trustees or other persons occupying fiduciary position.

The statutory duties of directors refer to those imposed by the company's Act and possible related enactments. The regulatory ones are to be found in the Articles of Association of the company, while the others comprise those duties which have been determined by case law over the years. These general law duties forms the largest body of duties devolving on directors. The duties consist of common law duties of care and skill and the fiduciary duties which are governed by equitable principles.

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62. Olawonyi; G. A. Op Cit. P. 32

Despite the various description of the real status of directors under common law, two of that categorization that stands out and is statutorily recognized in Nigeria is namely, directors as trustees and agents. The codification is in the provision of Section 283{1} and {2} of Nigeria's Companies and Allied Matters Act[63] which gave statutory recognition to the position of directors as both trustees and agents.

On the other hand, the duties of the directors are elaborate, though not exhaustive provided under sections 279 -282 of the Act.[64] For now our discussion is on legal position of directors provided specifically under section 283 of Companies and Allied Matter Acts 2004. For ease of reference, the section is quoted as follows:

1. Directors are trustees of the company's moneys, properties and their powers and as such must account for all the moneys over which they exercise control and shall refund any moneys improperly paid away and shall exercise their powers honestly in the interest of the company and all the shareholders and not in their own or sectional interests.

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63 Cap. 120, LFN 2004
64. Ibid

the company under part III of this Act.

The above new provision in our company law is a codification of the diverse judicial opinion which has been expressed over the years as regards the legal position of directors.

By the provision of section283{1}[65] which describe directors as trustees, the act has given recognition to the age long common law judicial authorities that hold the view that directors are trustees of their company. The Locus Clasicus is the case of **Charitable Corporation -V- Sutton**[66] where Lord Hardwicke had held that the committee men {that is to say, directors} of a chartered corporation who had misapplied its funds and broken its bye-laws were liable on the footing of trustees, for breach of trust. As has been stated above in the course of this writing, the reasoning of the learned law Lord was based on the fact that such committeemen under the deed of settlement had the property vested in them as trustees in the full sense.[67]

The provision of section 283{1} of the Act, perhaps restates and stamps the common law position clearly

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65. *Ibid*
66. *(1742) 2 ATK 400*
67. *Loc. Cit*

stated by Romer L. J. in the **Re City Equitable Fire Insurance. Co**[68] as follows:

> "It is sometimes said that directors are trustees. If this mean, no more than those directors in performance of their duties stand in a fiduciary relationship to the company, the statement is true enough to be an indication by way of analogy of what those duties are, it appears to one to be wholly misleading. I can see but little resemblance between the duties of a director and those of trustees. It is indeed impossible to describe the duties of a director in general terms. The larger the business carried on by a company, the more numerous and more important the matters that must of necessity be left to the manager, the accountants and the rest of staff".[69]

On the other hand, Section 283{2}[70] is a clear and direct provision that regarded directors as agent. This again is a recognition of the common law judicial view that has described directors as agents, a position that was made very clearer by Lord. Cairns, L. J. in **Ferguson -V- Wilson**[71], the Learned law Lord in regard to the

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68. {1925} Ch. 407 at 426; 133 L.T 520
69. Ibid P. 426
70. CAMA, Cap 120, LFN 2004
71. 1806) LR 2 Ch. 77

position of directors states as follows :

> "They {i.e. directors} are merely agents of a company. The company itself cannot act in its own person, for it has no persons, for it has no persons; it can even act through directors and the case is, as regard those directors, merely the ordinary case of principal and agent. Whenever an agent is liable those directors would be liable; where the liability would attach to the principal only, the liability is the liability of the company".[72]

In the Nigeria case of **Higgs -V- West African Airways Corporation {Nig} Ltd**[73] Taylor C.J. {as he then was} stated as follows:

> "The true position of directors is that of agents for the company. As such, they are clothed with the powers and duties of carrying on the whole of its business subject, however, to the restrictions imposed by the articles and any statutory provision."[74]

Thus, the Nigeria courts have construed the provision as

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72. *Ibid, P. 89*
73. *(1969) NLCR 304*
74. ***See 6 Halbury's Law of England (3rd Ed.) Para. 569 page 292. The learned C. J. adopted the whole of the provision in his judgment.***

such and have accordingly treated directors as agent of their companies.[75]

It suffices to point out that before the categorization of a director as a trustee and agent; it was widely held that a director is both trustee and agent of the company.[76]

From the foregoing, even though, a director may not be a trustee properly so-called, he is a trustee for some purpose. Similarly, as an agent he owes fiduciary duties to the principal. The duties of good faith which these fiduciary relationships impose are virtually the same with those imposed on the trustees. Thus the description of a director as a trustee will continue to have validity until when it gets the issue of duties of care and skill and the analogy breaks down.[77]

3.4 Nature of Directors Fiduciary Duties and To Whom Is Owed

The directors' duty of loyalty contains the essence of any common law application on interlock. Thus in recognition of the likely effect of interlocking directorates on the

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75. *See Nsirim –V- Omuna Construction Co. Ltd. (1994) 1 NWLR (Pt 318) 1; Bamgboye –v- University of Ilorin (1991) NWLR (Pt 70) 1 at P.30; Yesufu -v – Kupper international N. V. (1996) 5 NWLR (Pt 446) 17.*
76. *See Great Eastern Railway Co. –v- Turner (1872) LR 8 Ch. 149.*
77. *See Gower, LC. Principles of Modern Company Law (5th Ed) Sweet &Maxwell, (1992) P. 550.*

fiduciary duties of directors, section 281 of the Act[78] provides: -

> "The fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company including a duty not to use the property, opportunity or information obtained in the course of the management of one company for the benefit of the company or to its own or other person's advantage".[79]

On the other hand, section 279 of the Act[80] generally provided for the fiduciary duties of directors. It has been submitted that this section has introduced the most salutory innovation into the Nigeria Companies legislation in that the law makers have achieved express incorporation of all time important principles of English common law having to do with fiduciary duties of directors into the body of the Nigerian Company Legislation.[81]

Similarly, the provisions of section 281 of CAMA seems to be a re-validation of the decision of United

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78. *CAMA Cap 120, LFN 2004*
79. *S. 281 of CAMA corresponds with section 191 and Article 78, Table, 1st Schedule Companies Act, 1968. Both recognizes the principle of multiple directorships.*
80. *80. CAMA Cap 120 LFN 2004*
81. *See Sasebgon, D. "Nigeria Companies and Allied Matters Law and Practice. "Vol. 1 (1991), P. 431. See further section 279 (1 & (2) of CAMA, 2004.*

States of America's Court in 1966 where it was held that dual directors owe the same duty of good management to both corporations that it is to exercise (power) in the light of what is best for both corporations[82].

However, before going further to discuss Section 281 and the implication of the decision in the US case referred to above, it is appropriate at this point to digress a little to examine the nature of the fiduciary duties that a director owe and to whom the duty is owed under common law.

A fiduciary relationship has been explained by Fry, J. **In Re West of England case**[83] to mean a situation in which, if a wrong arise, the same remedy exist against a wrongdoer on behalf of the principal, as would exist, a transfer on behalf of cestui que trust, and directors come within this term fiduciary.

It has been submitted that the important feature of corporate form of business is that a centralized management comprised of directors represent the collective interest of all the shareholders.[84] These directors manage the business of the company. This places the

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82. See Warshaw Calhoun 221 A&D (Del. 1966) 487

83. (1879) 11 Ch. D. 722, P, 778. See also Re Hallet's Estate Knatchbull –v- Hallet (1880) 13 Ch. D. 696, P. 713 see also Scott, "The Fiduciary Principle"(1949) 3 Cal. L Rev. 539, P. 540 and Sealy (1962) Camb .L.J (supra).

84. See Olawoyi, G.A Op. Cit P. 31

directors in special relationship which has been described as a fiduciary.

The Common Law recognized the directors of a company as occupying a fiduciary position in respect of their company whether as trustees or agent. As a fiduciary, they are no doubt expected to maintain and in the discharge of their duties, to observe some injunctions.

The rule under common law is that directors of a Company owe fiduciary duties to their company and not the shareholders.[85] This common law position which seems to have strong judicial backing from the long list of recent pronouncements from common law courts also seem to have answered the question posed by Frankfurter J. in the US case of **SEC -V- Chenery Corporation**[86], as follows:

> "To say that a man is fiduciary only begins the analysis; it gives direction to further enquiry. To whom is he a fiduciary? What obligation does he owe as a fiduciary?
>
> It is now recognized principle of law that the directors of a company owe certain fiduciary

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85. ***Percival –V- Wright {1902} 2 Ch. 421. See also Perkins –V- Anderson {2001}, BCC 874, {2001}1 BCLC 372 Platt -V- Platt {1999} 2 BCLC 745 {Ch.D}. Brunningham –V- Galvanic {1999} 17 ACLC 247 {Newsouth Wales}.***

86. ***318 US 80 (1866) (supra).***

obligations as well as common law duties to their company and not to the individual shareholders. That being the case, the question of the Learned Justice has raised the issue as to whom does a director owe duty as a fiduciary and what are the general characteristics and limits of these duties and obligations. The duties of directors are, from foregoing, partly statutory, imposed by company's legislation and other related enactments; partly regulatory as would be found in the Articles of Association of the company and partly dependent on the Law of trustees and agents or other persons occupying a fiduciary position to the company. The last categories are those duties found on case law pronouncement over the years. These include common law duties such as duties of care and skill and other fiduciary duties regulated by equitable principles of agency and trusteeship.

Going further on this subject, it is even the general rule that directors must act collectively as a board to bind the company. However, their duties of good faith are owed individually to the company.

The duties of the directors are elaborately provided under Section 279 of the Act.[87]

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87. CAMA Ibid

Section 279{1} recognizes the fact that "a director stands in a fiduciary relationship towards the company and therefore must observe utmost good faith towards the company in any transaction within or on its behalf. The companies Act, 1968 did not give any guideline on this provision, though at common law and in equity, directors have been variously referred to as trustee and agents. It has been argued that it is wrong to call them trustee without any qualification. They are not accountable as trustee of Will or Marriage Settlement and are not legal owners of the company[88]. Hence Romer, J. said in **Re City Equitable Fire Insurance Co. Ltd**[89] as follows: -

> "It has been said that directors are trustees if this means no more than that Directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading."[90]

However, Lord Selbourne hold slightly different view. In **Great Eastern Railway -V- Turner,**[91] the Learned Law Lord held that Directors are mere trustees of the

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88. Sasegbon, D. Op Cit 431
89. (1925) Ch. 407
90. Ibid P. 426
91. (1872)1 R. 8 Ch. App. 149

agents of the company –trustee of company monies and property, agents in the transaction which they enter into on behalf of the company.

Therefore, at common law, the directors are trustees of the people's money and property, which they manage. They can be asked to account for it. Also, the fact that they must exercise their powers honestly and in the interest of the company makes them trustees of the powers.

However, when they deal with matters connected with the company on the company's behalf, they do so as agents, for the company. It is on this strength that Cairns L.J in answer to a question regarding the position of directors of a company in **Ferguson -V- Wilson**[92] declared as follows;

> "They {i.e Directors} are mere agents of a company. The company itself, cannot act in its own person, for it has no persons, it can only act through Directors and the use is as regards those Directors, merely in the ordinary course of principal and agent. Whenever an agent is liable those Directors would be liable, where the liability would attach to the principal and

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92. ***1866} L.R. 2 Ch. 7 at 89-90, see also Smith – V Anderson {1880} 15 Ch. D 247 at 276, 280 and generally, Parker –V- Mckenna{1874} LR. 10 Ch. App 96, 98 & Laugua Nitrate Company -V- Laugna Syndicate {1899} 2 Ch. 392.***

the principal only, the liability is the liability of the company".[93]

Professor Olawoyin[94] has observed that the true relationship between a company and its Directors seem not to be that of principal and agents, not that of master and servant, not that of trustee and beneficiary. Although the relationship is in some respect akin to all these, it is sui generis. The directors in fact do act like agents and trustees.

At this stage, it is my view that the point is not whether directors of a company are trustees or agents, but most importantly, whether he is seen as agent or trustees, he stands in a fiduciary relationship with the company and must necessarily act at all times with good faith and intention, honesty and prudence in the interest of the company. This is the import of Section 279 of the Act.[95]

Thus the provision has imported into the body of Nigerian company Law, the principle of English Common Law and Equity relating to the true relationship of directors to their companies. And the directors are therefore fiduciaries when acting for or with the company.

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93. Ibid at 89 -90
94. G. A Olawoyin, op cit P. 10
95. CAMA Cap 120 LFN 2004

It is however to be noted that directors fiduciary relationship is not own to the company only when he transact business with the company or on behalf of the company. The provisions of Section 279 {2}[96] now extends the scope of the relationship to cover a situation where a director is acting as agent of a particular shareholder or the shareholder is dealing with the company's securities.

The provision raises a very important issue as to whom does a director owe any duty as a fiduciary. It is a settled and recognized principle of the English Common Law that directors duties of good faith are owed individually to the company.

Thus, in case of **Briess –V- Woosley**,[97] A director of a company was authorized to sell the shares of another company at a general meeting of the company and the director made fraudulent misrepresentations in the course of his acting as such agent which was not known to the shareholder. It was held in an action for fraudulent misrepresentation that the shareholders were liable in damages because the director was liable not as a directors Per se, but as an agent of the shareholders for the purpose of disposing their shares. Also, in the case of

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96. CAMA Ibid
97. (1954) AC 333; 2 WLR 832

Allen -V- Hyatt[98], the directors persuaded shareholders to give them options to purchase their shares so that the directors could negotiate a sale of the shares to third party. The directors acquired the shares under the option and later resold them at a profit. It was held that the directors must account to the shareholders for whom they had taken to act as agents.

It suffice to say here that before the cases of **Breiss -V-Woosley**[99] and **Allen –V-Hyatt**[100] were decided, the case of **Percival -V- Wright**[101] decided, in 1902 was in opposite. In that case the directors of the company bought shares from some of their members, without letting them know that the sale of the company was being negotiated at a price, which was likely to increase the value of their shares. In an action brought by the vendors to recover damages from the directors who had failed to disclose the vital information, it was held per Swinfen Eady J. that there was nothing unlawful in what had been done. His reason was based on his personal opinion, that directors of the company are not trustees of the individual shareholders and as such are not obliged to disclose the fact of an imminent take- over bid to them.

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98. (1914) 3 TLR
99. (1954) AC 333 (Supra)
100. (1914) 3 TLR 444 (Supra)
101. (1902) 2 Ch. 421 (Supra)

The probable reasons why the learned Justice arrived at this decision could have been because {a} no firm offer was made which the directors could have laid before the shareholders {b} absence of unfair dealing by the directors and {c} absence of any evidence that there was intent to defraud the vendors.

It has been argued that the company being a distinct person from its members owning, it is the only person to whom the directors are answerable. It suffices to point out again that the principle that fiduciary duties of directors should be owed to the company, does not take into account the ownership structure of the company.

However, if the decision in **Percival -V- Wright**[102] is to be taken as an authority, it could afford the directors of the company opportunity to use insider information for their selfish and greedy interest at the expense of the members and creditors of the company.

From the foregoing, the case of **Allen -V- Hyatt**[103], seems to have created a limited exception to the decision in **Percival -V- Wright**[104], for it lays down the principle

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102. (1902) 2 Ch. 421 (Supra)
103. (1914) 3 TLR 44 (Supra)
104. (1902) 2 Ch. 421 (Supra

that where the directors of a company made representation to the shareholders that a particular state of affairs exists and on that representation the shareholders gave certain advantage to the directors, any profit which the directors may realize in those circumstances, will be held in trust for the shareholders.

It is hereby humbly submitted that if the directors choose to remain silent, and do nothing to mislead the shareholders, the principle may not apply to them.

The general rule was expressly approved in the Nigeria case of **Okeowo -V- Migliore**[105] in which Eso, JSC, stated as follows:

"It is the duty of the directors of a company to exercise powers vested in them for the benefit of the company; their fiduciary relationship is not for individual advantage but for the company".[106]

Finally on this point, except in case of misrepresentation, section 279 {2} of CAMA is a substantial reform of the rule in **Percival -V- Wright**[107] in that it recognizes that directors can act as agents of shareholders or other persons, who is dealing with the company's securities

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105. (1979) 12 NSCC 210;
106. Ibid at P. 263.
107. (1902) 2 Ch. 421 (Supra)

and thereby stand in fiduciary relationship towards them. Thus if there is no misrepresentation in any form, the general rule that when directors act as agents, they are agents of the company and not the individual members still applies.

In **Automatic Self Cleaning Filter Syndicate Company - V- Cunningham**[108] the shareholders argued that the articles of association are subject to the general rule that agents must obey the directions of their principals and that the directors, being their agents, had no right to refuse to obey their instructions or directions. The English Court of Appeal rejected this argument on the ground that the directors were not agents of the shareholders and therefore upon the construction of the articles, the directors could not be compelled to comply with the resolution giving power to the directors to effect the state of the company assets.

It is worthwhile to point out at this juncture that the provision of Section 281 of the Act[109] seems to be at variance with the recommendations of the Nigeria Law Reform Commission in its report on the Reform of Nigeria Company Law[110]. The report highlighted the effect of

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108. (1906) 2 Ch. 43.

109. CAMA Cap 120 LFN 2004.

110. See report on the Reform of Nigeria Company Law, Vol. 1 Nigerian Law Reform Commission, Ikoyi Lagos, Nigeria (1988) P. 20-226.

conflicting interest where a director is competing with his company and noting that no legislation exist against it stated as follows:

> "Due to what we consider a legal laxity, multiple directorships has become a feature in our company practice without any affective regulation to check its abuse. In practice, a person may hold an unlimited number of directorships on various boards, or he may fill all or some of the boards with his alternates at the best, where the articles so allow. We find a multiple directorship of public companies objectable for these reasons.
>
> First, it places an undue burden on the fiduciary duties of the directors to be impartial and to bring sound judgment and honesty to bear on their dealing with their beneficiaries
> {the companies}. Secondly, it can hardly be cynical to suggest that multiple directorship has contributed in no small measure to the economic malaise of some of these companies due to the poor performance of their board. "

For efficiency at the boards and to avoid placing directors in tempting or suspicious position, we suggest that multiple directorships should be strictly controlled and so we recommend a maximum of 4

directors for one person. In addition, all the directorships held by a person seeking to be appointed s directors should be disclosed at the meeting of which he is being considered."[111]

This comments show the importance the Commission attached to the concept of multiple directorships. But the legislation that was promulgated subsequently fell short of this recommendation. This is however, not surprising since all those who were to take decision were usually the decision maker who are ardent supporters of class hegemony.

The issue therefore, is how in practice can the duties of a director to act in good faith towards the companies on which he is on their boards be reconciled with Section 281 which permits multiple directors especially as the duty is owed to all the companies the director is on their boards. The second issue is whether the duty owed by executive directors is the same as those owed by part-time directors.

There is no intrinsic difference between the two since the provision of Section 281 does not distinguish between managerial or executives directors and part-time or non executives directors. Infact, the functions of the

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111. Ibid. P. 220-226

board of directors is indivisible unless particular powers are delegated. Thus if a breach of duty is to be attributed to a board on the basis that all of its members were present at a meeting which approves a wrongful act, then the liability of the director is joint and several and no allowance is made for the fact that some are non-executives or part-timers and may have acquiesced in a situation which they did not fully understand.[112] This places the directors in the same position as trustees. This proposition must be contra-distinguished from situation where a professional director is appointed in which case higher duties of care and skill are expected from such directors.

However, it must be stressed that where a director has a service contract with the company, more obligation that go beyond his duties as a director may be imposed on him.

It thus suffices to point out that an executive director under service contract of employment are rarely involved in corporate interlocking through multiple directorship as such service contract may contain provision barring them from holding position in other companies.

3.5 Acting in the Best Interest of the Company and thers

Under Section 279{3} of the Act[113] it is provided that a director shall act at all times in what he believes to be in

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112. See Re Lands Allotment Company (1894) 1 Ch. 616
113. CAMA. Ibid.

the best interest of the company as a whole so as to reserve its assets, further its business and promote the purpose for which it was formed and in such manner as a faithful, diligent, careful and ordinarily skillful director would act in the circumstance.

Here directors of company who are seen as the managers of the company are conferred with immense discretion. However, the exercise of the discretion must not be abused. They are to use their own judgment and not judgment of others. But where reliance is placed on the judgment, information and advice of others, they may not be liable in negligence.

In the case of **Dovey and Metropolitan Bank -V- Cory**[114] a director of a joint stock banking company in assenting to the payment of dividends out of capital and to advances on improper security, honestly relied on the judgment, information and advise of the chairman and the general manager of the Bank by whose statements he was misled and whose integrity, skill and competence he had no reason of suspecting. It was held that upon the true facts of the case, he was not negligent of his duties as director and was not liable in the winding up. By this decision, it is

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114. {1901} W.N 170, Note the Judgment in the case affirms the decision in Re National Bank of Wales Ltd {1899} 2 Ch. 629. See also Re New Mashonaland Exploration Co. {1892}3 Ch. 577. and Giblin –V- McMullen {1868} L.R 2PC 317 at 336.

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submitted that directors could equally rely on the opinion of experts.

It is therefore humbly submitted that the provision of section 279{3} appears to be an invitation not to use information, opportunity and property of the companies recklessly because the test is very subjective when applied in interlock situation. Thus in an interlocking directorate, a director can use such information, opportunity and property of another company and argue that he has acted in what he believed to be the best interest of the companies. It is to be noted however, that even though courts may allow such situation by recognizing the director's absolute

discretion, they would most likely interfere by critically examining the conduct of the director to determine whether a reasonable director could have believed that a course of action was in the best interest of the companies.[115]

It is required that directors are charged with the duty to act for their company according to their best judgment. The languages of the Law that need close treatment here is "what he believes to be in the best interest of the company. By the demand of the office of directors and the obligation they assume, the directors must do all that is reasonable

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115. See Charterbridge Corporation –V- Lloyds Bank Ltd (1970) Ch. 62

and prudent and careful for the protection of the interest of the company as a whole. Thus their belief should be honest and proper and must be in the interest of the company. The directors in this situation "must act bona fide in what they believe not what a court may, consider is in the interest of the company".[116]

The judicial approach is subjective and thus the directors are not expected to feather their own nest or favour any sectional interest. For example in the case of **Re. Wand M. Reith, Ltd;**[117] where the directors authorize the making of an agreement to provide a pension to the widow of a former employee, the agreement was held to be voidable at the instance of the company for that was hardly in the interest of the company.

Similarly, the directors cannot make gratuitous payment or gift of the company assets. Thus in the case of **Parke—V-Daily News Ltd**[118] where a gratuitous payment was made to the employee of a company who became redundant upon amalgamation, it was held that the payment was ultra varies as it was not for the benefit and prosperity of the company. The court further held that payments out of the assets of the company would only be intra vires if the same

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116. See Re Smith -v-Fawcett (1942) Ch. 304 P. 306.
117. (1907), ALLER 427
118. (1902) Ch. 927

is made bona fide and were reasonably incidental to the carrying on of the business of the company and for the benefit and prosperity of the company.

An exception has been developed whereby gratuitous gift out of assets of the company have been made, for charitable, political and educational purposes[119]. This exception is based on the concept of corporate social responsibility of corporations to the community in which they carry on businesses.

The traditional assumption is that the company's sole business or responsibility is towards profit maximization for the benefit of the members.

There has been growing apprehension of this position assumed by the law since the decision in **Parke -V- Daily News Ltd,**[120] where an application was made to court for an injunction restraining paying away of proceeds of sale of the company to workers laid-off and made redundant thereafter. It was argued that gratuitous payment could only be made where there were reasonably incidental to the carrying on of the company business. In that case the court held, inter-alia that the company's fund cannot be applied in making exgratia payments and also that the

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119. See Evans –V- Bunner Moud & Company (1921) 1 Ch. 359
120. (1902) 2 ALLER 929; Ch. 279; (1962) 3 WLR 566

court has jurisdiction to inquire into the motive giving rise to the gratuitous payments and the objects which it intended to achieve.

The court will uphold such payment if after enquiry it meets the test laid down in the case **Re Lee Beherens Co. Ltd.**[121]

The tests are:

a) Is the transaction reasonably incidental to the carrying on of the company's business?
b) Is it bona fide transaction
c) Is it done for the benefit and to promote the prosperity of the company?

The apprehension brought about the classification of interest groups in a company into three namely, the shareholders, the workers and consumers and the general public. In doing business, the large corporation should not only do their business properly and honestly but must also meet their obligation to the public by being good citizen.

In order to do this successfully, the company has to bear some form of social responsibility to it workers as well as the general public while making money for its shareholders.

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121. (1932) 2 Ch. 46

It is said that the principle emerged after the industrial revolution in Europe but due to conservatism and a jealous attachment to common law, the concept was not readily a accommodated.[122] The English Companies Act of 1967[123] thus made disclosure of political and other charitable gifts by companies mandatory. But in all this, the interest of the employee and that of members should not be forgotten. The 1985 English Companies Acts[124], which provides that such acts of corporate responsibility are not ultra vires, sealed up the decision in **Parker -V- Daily News Ltd.** [125]

In the US, the concept was well encouraged by the corporation laws.[126]

In Nigeria, the concept was not felt before the economic down turn of the early eighties, but the companies Act, 2004 has made the matter easier for companies to be socially responsible towards their employees and the general public by modifying the common law position thereby overruling cases like **Parke -V- Daily News Ltd,**[127] and **Lee Beherens & Co. Ltd**[128]

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122. *See Tom Hader: "Company Law and Capitalizatism" P. 131*
123. *S. 19 of English Act 1967*
124. *S. 46 of English Act, 1985, see also part 1 schedule 7, para 3-6 of Companies Act, (UK) 1985*
125. *(1962) 2 AllER 692 (supra).*
126. *Rockefeller, J. D. Jr; "The Personal Relationship in Industry N.Y 1926, see also A. P. Smith Manufacturing Co.-V-Barlow 98A 2nd 581 {NJ} 1953{67 U.L.R 342.}*
127. *(1962) 2 ALLER 629 (Supra)*
128. *(1932) 2 Ch. 46.*

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By virtue of its section 649 reinforced by section 518 and 384.[129]

Thus, using the company funds and property to meet the company's corporate social responsibility provides a reasonable exception to the principle and legal position that such must be to the benefits of the company and its member only.

This is the principle enunciated in the case of **Harlowe's Nominee Pty Ltd -V- Woodside {Lake Entrance} Oil Company**[130] where it was held that directors in who are vested the right and duty of deciding were the company's interest lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment if exercised in good faith and not for irrelevant purpose, is not open to review in the courts.

This pronouncement was re-echoed in **Howard Smith -V- Ampol**[131] where Lord Wilberforce outlined the course of investigation adopted by the courts in reviewing a challenge to the exercise of directorial powers. The importance of the review is that, the directors do not

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129. CAMA, Cap120 LFN 2004
130. (1969-70) 121 CLR 483
131. (1974) 1 AllER 1126 ER

have unlimited discretion in the exercise of their powers.

Thus, if directors act bona fide in what they believe to be in the best interest of the company, it must be for proper purpose for which the power was delegated unto them or they will face a claim in an action for breach of duty.

However, in **Re Smith -V- Fawcett**[132] it has been distinguished that there may be no breach if in the course of exercise of such power, it affects a member adversely. In that case, article10 of the articles of association of a private company provided that:

> "The directors may at any time in their absolute and uncontrolled discretion refuse to register any transfer of share and clause 19 of Table A shall be modified accordingly".

The issued capital of the company consisted of 8,002 ordinary shares, of which the two directors of the company JE and NS, held 4001 each. J.F died and his son as his executor applied to have the testators shares registered in his name. N.S. refused to consent to the registration but offered to register 2001 shares and to buy 2000 at a fixed price. The executor applied to the court by way of motion that the register of members of the company might be

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132. (1942) Ch. 304; 1 All ER 542; see also Mills –v- Mills (1978) 60 CLR 150.

rectified by inserting his name as the holder of the 4001 shares. It was held that article 10 gave the directors the widest powers to refuse to register a transfer and that while such powers, are of a fiduciary nature and must be exercised in the interest of the company, there was nothing to show that they had been otherwise exercised.

This principle appeared to be supported by Section 279 {5}[133] which provide that:

> "A director shall exercise his powers for the purpose for which it is specified and shall not do so for a collateral purpose and the power, if exercised for the right purpose does not contribute a breach of duty, if it, incidentally affects a member adversely"

By the provision of Section 279{4}[134] the directors in all these situations, most bear in mind the interest of the employees in general as well as those of its members. This duty has been described as covering any director of a Company {who enjoys the confidence of the board} instituting an action to protect the interest of the company.

The purport of this provision is to allow the pursuit of the interest of the company's employees along with the

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133. CAMA Ibid
134. CAMA Ibid

interest of the members. By this position, the principle enunciated in the **Parker -V Daily News Ltd**[135] has been incorporated into our companies Act.[136]

The principle is that the companies are not allowed to make donation out of their assets but this will be subject to exceptions which are considered to be beneficial to the overall interests of the company and this include welfare of its employee. However, in **Ejakam -V- Devon Industries Ltd,**[137] the court limited the scope to certain appropriate or emergency and situational circumstances as event would dictate.

Judging from the foregoing, directors who are shareholders may promote their own interest in interlock situation if such is incidental to the promotion of the interest and prosperity of the company as a whole.

Thus, it is now clear that for an act to be in the best interest of the company as a whole it should preserve the company's asset, further its business and promote the purpose for which the company is formed and this may

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135. (1962) 2 ALLER 693 (Supra)
136. CAMA Cap. 120 LFN 2004
137. (1998) NWLR (Pt.534) 417

include any other act which has good intention for the company as a whole.[138]

If the directors are not going to be liable for duty to act in the best interest of the company they must be diligent, faithful careful and ordinarily skillful. The only exception being that provided by **Re City Equitable Fire Insurance Co.**[139] that a director need not exhibit, in the performance of his duties, a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.

Again under section 279 {5}[140] of the Act, the duty to act bone fide in the interest of the company requires the directors to exercise their power for proper purpose and not for any collateral purpose, and the exercise of the power, if it is for a right purpose cannot constitute a breach where a member is adversely affected. The implication is that the directors' power must be exercised for a given purpose, which is proper.

In **Australian Metropolitan Life Assurance Company -V- Ure,**[141] Isaacs J. commenting on director's powers stated as follows:

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138. See Walsh, J. K. " Exercise Of Power In The Interest Of The Company" (1967) 8 West Australian L. Rev. 176
139. (1921) Ch. 407 [supra P. 426]
140. CAMA Ibid
141. (1923) 33 CLR 199

"..... It must be exercised as all such powers must be, bona fide, that is for the purpose for which it was conferred, not arbitrary or at the absolute will of the directors, but honestly in the interest of the shareholders as a whole".[142]

Professor Gower[143], in his own opinion submitted that... "it is for the court to decide on a true interpretation of the articles, what the purpose was for which the power was conferred".

The directors power in this case frequently arises in allotment of shares where the power include that of raising capital for the benefit of the company. If the directors are giving powers to raise capital fund for the company through issuance of shares, there will be improper use of such power if such issue is made to benefit the directors or other persons or to create a new majority shareholder or dilute existing majority shareholding structure to ensure control by the director or such other persons.

In **Hugg -V- Crompton Ltd,**[144] the director issued shares in order to set up a trustee scheme which would discourage a take- over bid and also ensure their

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142. Ibid at P. 217
143. Gower op. Cit P. 286
144. (1966) 3 ALLER 420

continued control of the company. Buckley J. held that the directors are not entitled to use their powers in issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company; or merely for the purpose of defeating the wishes of the existing majority of shareholders. Here the directors good faith was disregarded and held irrelevant for determining the propriety of purpose.

The proper purpose was also applied in the case of **Anselt –V- Butler Air Transport Ltd.**[145] In that case the defendant directors issued shares to the employees of the corporation with the aim of preventing Anselt from assuming control as a majority shareholder. The issue of allotment of shares did not arise but it was found that the purpose of the sale was to put shares in the hands of those loyal to the directors of Butler Air Transport.

Butler's directors honestly believed that a take-over by Anselt would be dangerous to the interest of the company.

The court invalidated the directors' action and concluded that the power to issue shares was not given to the directors for the purpose of ensuring the continuance of

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145. (1958) 75 WN (NSW) 299

their policies or depriving the majority of their right to control.

If the directors actions are only voidable judging from the way the court treat the breach of duty by directors which breach arises out of an allotment for an improper motive, such actions may be ratified by the company at its general meeting after full and frank disclosure by the directors to the shareholder.

In the celebrated case of **Howard Smith Ltd. -V- Ampol Petroleum Ltd,**[146] Ampol and another shareholder, Bullkships Ltd, held 55% of the issued share capital of Miller Ltd. Ampol made an offer to take over all the issued shares in Miller at 2.27 dollars per share, but the directors of Miller Ltd allotted 4,500,001 dollars shares to Howard Smith Ltd, at a premium of 1.30 dollars per share. The allotment was not made by the directors for any reason of self interest but because although, not desperate for cash, the miller board believed their company to be in need of further capital, and to destroy the majority holding of Ampol and Bullkships, thus opening the way for Howard Smith Ltd, to make a successful offer to take over the shares of the minority shareholder at a price which the directors of Millers knew would be 2.50 dollars per share.

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146. (1974) AC (supra)

shares in Miller at 2.27 dollars per share, but the directors of Miller Ltd allotted 4,500,001 dollars shares to Howard Smith Ltd, at a premium of 1.30 dollars per share. The allotment was not made by the directors for any reason of self interest but because although, not desperate for cash, the miller board believed their company to be in need of further capital, and to destroy the majority holding of Ampol and Bullkships, thus opening the way for Howard Smith Ltd, to make a successful offer to take over the shares of the minority shareholder at a price which the directors of Millers knew would be 2.50 dollars per share. It was held by the Privy Council that Ampol's action for setting aside the issue to Howard Smith succeeded.

The main issue was whether the primary purpose of the allotment to Howard Smith was to destroy the majority shareholding of Ampol and Bulkships or whether the Miller board was acting to satisfy their company's need for capital. The Privy Council found as a fact that the intention of the Miller Board in voting in favour of the allotment was to reduce the proportionate combine shareholdings of Ampol and Bullkships in order to induce Howard Smith to proceed with its take over bid. The allotment was therefore set aside.

This case is thus regarded as the judicial synthesis of the law and conversely surrounding the criteria for the

exercise of the directors power in this regard.

Another way in which interlocking directorate can affect a company is the way that the directors vote. The best practice however, is for a director to abstain from voting if he feels that his interest in other companies he hold multiple directorship will be adversely affected.

Section 279{6}[147] of the Act, has provided that a director shall not fetter his discretion to vote in a particular way. Since the directors are trustee of their powers, they cannot fetter their exercise of such powers by entering into an agreement to vote in a particular way at future board meetings.

It was held in **Clark-V- Workman**[148] that the directors of a company must act strictly as trustee in carrying through transfers of shares, unfettered by any undertaking or promise to any intending purchaser.

Also in the case of **Horn -V- Henry Faulder and company Ltd,**[149] there was an agreement giving a manager exclusive powers in the department contrary to the articles which gave the directors supreme control in

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147. CAMA Cap. 120 LFN 2004

148. (1920) 1 Ir. R. 107

149. (1908) 99 L.T 524

management of the company. It was held that the agreement was ultra vires the article.

It seems that the application of the rule provided under section 279{6} of the Act[150] will bring about conflict with the duties of a nominee/director who has been appointed to another company's board by his principal and has been asked to exercise his voting right in a particular way. Reason being that any act which hampers or tends to hamper the exercise of a discretion amount to fettering the same.

The nominee Director here is a by-product of a rule that a director owes duty to the company alone and that a director who has some special outside concern is not entitled to put the interest of the party he represents above those of the company. The result is that a nominee director is not entitle to subordinate the interest of the company to those of the person or body he represents on the board.[151]

The law is that the nominee director should disregard the special interest to which he owe his appointment in favour

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150. CAMA Cap 120 LFN 2004.

*151. **Compare this with the position of a director of a subsidiary appointed by a holding company. In this case, there is no way the director will act contrary to the directive of the holding company.***

of the interest of the company on whose board he has a seat.

Thus. the House of Lords held in the case of **Scottish Cooperative Wholesale Society –V- Meyer.**[152] that the disregard of the interests of a subsidiary company by the nominee directors of its parent company could amount to and did in that case amount to an oppression of the minority shareholders in the subsidiary company under section 201 of English Company Act, 1948.[153]

The issue here is whether is it possible to ascertain this in practice because if a director has a substantial interest in a competing company, and he decide to vote in a particular way so as to pave way for the other company to win the contract, can this be ascertained?

Under section 279{7}[154] it is permissible for a director, where he is allowed, to delegate any of his powers in the performance of his statutory duties. It should however, be noted that delegation of powers does not amount to an abdication of duties. This reminds one of the general principles which says that directors without express authority to do a thing, cannot delegate their duties or powers for same.

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152. (1958) 3 WLR 404; (1959) AC 324
153. The section is identical to S. 201 of 1968 Nigeria's Company Act.
154. CAMA {Supra}

In the case of **Re Leeds Banking Company, Howard's case,**[155] the court held {affirming the decision of Kindersley V.C in the lower court} that the Board of directors could not delegate their powers, and that if the shares had been allotted, it was ultra vires, and, therefore that the shareholder's name must be removed from the list in respect of such shares.

But where they have sufficient powers of delegation, directors may delegate any of their powers to committees or even to a single director.

This is experienced in the grant of proxy by absentee or indisposed director to other directors on the board to exercise their power on their behalf. Thus in **Harris case**[156] where a committee appointed by directors allotted shares to an applicant, the court held that under the article of association of the company, the allotment of shares by a committee instead of the whole board was valid.

Considering the issue further where specific powers are properly delegated, directors are absolved from liability for the exercise of those powers. However, it is important to note that they cannot delegate the whole of their functions as they must continue to exercise a proper supervision.

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155. (1866) Ch. App. 561.
156. (1872) 7 Ch. App 587

The fiduciary duty is that the directors' power of delegation must be used bona fide and they cannot form a committee to deal with the affairs of the company in other to exclude one or more of their number from acting. Thus delegation must not be such as to make the body to whom power is delegated become uncontrolled or uncontrollable in the performance of the duties it has undertaken.

Thus, Lord Coleridge C. J. in the case of **Huth -V- Clarke**[157] enunciated the law relating to the principle of delegation of powers as follows:

> "Delegation does not imply denudation of power and authority. The word "delegation" implies that powers are committed to another person or body which is as a rule always subject to resumption by the power delegating and .....unless, therefore, it is controlled by statue the delegating power can at any time resume its authority".[158]

The authorization here, it is submitted must not be authorization couched in general terms. Such authorization must be express and specific. Thus the power of allotment

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157. (1890) 25 QBD 391

158. Ibid, P. 394. See also Palmers Company Law [21st Ed] P. 555-556; Pennington, Principles of Company Law [2nd Ed] P. 485 and judgment of Slade J. in Manton –v- Brighton corporation [1951] 2 All ER 101 P. 106-107.

of shares, expressly vested in a board of directors cannot be delegated by them unless some express authorization exists to that effects.[159]

The issue here then, is on who rests the liability for breach of any of the duties which a director owe to his company. Subsection 279{8}[160] seem to provide the answer. By that section no provision in the articles or resolution of a company or in any contract shall exempt any director from the duty to act in full compliance to the provision of the company act. Thus, where there is a breach of any duty owed by the directors to the company, and a liability is occasioned, no exempting clause can absolve the directors.

It is on this strength that section 279{9}[161] make any duty imposed on a director enforceable against the directors by the company. It thus makes it impossible for a member or groups of members to maintain an action against the director who breaches any of his duties. The right of action exercisable by the company alone accrued or derives from the principle in **Percival - V- Wrihgt**[162] to the effect that the fiduciary duties of the directors are owed to the company as whole and not individual shareholders.

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159. See Re Leeds Banking Co; Howard's Case.(supra).
160. CAMA Cap 120 LFN 2004.
161. CAMA Cap. 120 LFN 2004
162. (1902) 2 Ch 421 (supra)

This is in tandem with the corporate responsibility theory that a body corporate is separate and distinct from its shareholders and as such the company should be the persons having right to enforce duties owed to it by its directors. Thus in the case of **Foss -V- Harbottle,**[163] it was stated that the proper plaintiff in action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association itself.

The main issue here is when we talk of multiple directorships in relation to discharge of fiduciary obligation owed by directors in a situation where section 279{9} has expressly conferred on the company the right to enforce the duties imposed on and whose aim is in no doubt to prevent multiplicity of actions, by individual members, what happens when the issue relates to breach of duty by a director or many directors on the board of the company and there is refusal to sue. This portends danger as the aggrieved may not be able to obtain justice.

However, it has been suggested[164] {and I agree with the suggestion} that in such situation personal, representative or derivative actions may be brought by members or their

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163. (1843) 2 Hare 461

164. See Sasegbon, D. "Nigeria Companies and Allied Matters Law and Practice" P. 438.

representatives to enforce the directors duties. But if this is to be achieved Section 279{9}, 300{1} and 303{1a} of the companies Act may have to be read together. This is the only way the negative effect of interlocks can be addressed.

It is thus submitted that as beautiful as the provision is, it may be difficult to be complied with in practice even in situation of interlock with multiple directorship, not withstanding the provision of Section 279{8},[165] which provides that no provision whether contained in the Article or resolution of a company, or any contract shall relieve any director from duty to act in accordance with the provision of Section 279 generally.

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165. CAMA, Ibid, and Percival –v- Wright 2 Ch. 421 (supra

CHAPTER FOUR

DUTIES OF CARE AND SKILL AND CONFLICTS OF INTEREST

4.1 Introduction

In fidelity to the demands of their office and the obligations assumed by them, directors must do all that is reasonable, prudent and careful for the protection of the interest of the company as a whole. They are not expected to discriminate between the members of the company or to gain advantages that may be denied to other shareholders.

In a situation where a director holds multiple directorships in companies, will he be able to discharge the fiduciary obligations or duties to each company? The truth is that a director can in law hold multiple directorship provided he can discharge the obligation required of him as a fiduciary.

Originally, the common law fiduciary duties of loyalty and good faith were the main weapon against the negative effects of interlock. Nigeria has codified this common law provision in its companies Act,[1] the country's main company's legislation or statue in operation.

The acid test therefore, is to determine whether a director holding multiple directorships can effectively and

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1. *CAMA Ibid.*

efficiently discharge his fiduciary obligations of care, skill and diligence, loyalty, fairness and good faith and avoid conflict of duties and interests in interlock situation.

These fiduciary obligations will be discussed in this chapter, to determine, the effect or otherwise interlocking directorate or multiple directorship will have on management and control of companies and corporations.

4.2 Duty of Care and Skill

By the very nature of the position of a director, he must take some certain risks to argument the profit of his company. A director who is faced with a number of possible investment opportunities is in no doubt taking some risks, however remote, the actual likelihood of failure, when he chooses a particular form of investment in preference to the other. The need to exert judgment in business appears to underly the difference between the degree of care the law expects from, for instance, a trustee on one hand, and the director on the other hand in the discharge of their duties, which is fiduciary in nature.

The existing different kinds of companies and the varying circumstances of company directors seemed not to pave way for the judiciary to attempt to law down some objective and realistic standard of duties of care and skill at common law. What is being said is that the

circumstance of each company and its directors are the guidelines for determining the extent of the duties of each of such directors in the management of the company business. Hence it has not been possible to fix a set and realistic standard of reasonableness as to the degree of skill and care expected of a director in the discharge of his duties to the company.

Thus, Lord Macnaghten put this position clearer in the case of **Dovey -V- Cory**[2] wherein he expressed as follows:

> "I do not think it desirable for any tribunal to do that which parliament has abstained from doing - that is, to formulate precise rule, for the guidance or embarrassment of businessmen in the conduct of business affairs. There never has been and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more"[3].

This simplistic approach to the principle relating to the duties of care and skill no doubt would have given rise to managerial incompetence with its negative impact on

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2 *(1901) AC 477*
3. ***Ibid at P. 488***

investors in companies.[4]

What is to be the classic common law determinant of the degree of care and skill expected from directors and the nature of their liability for negligence has been considerably exposed in the locus classicus case of **Re. City Equitable Fire Insurance Co**[5] where it was held that in essence, the director must exercise the degree of diligence and skill that can reasonably be expected from a person of the directors knowledge and experience. In that case, Romer J. said as follows:

> "In discharging the duties of his position – a director must, of course, act honestly, but he must also exercise some degree of both skill and diligence. To the question of what is the particular degree of skill and diligence required of him, the authorities do not, I think, give any very clear answer. It has been laid down that so long as a director acts honestly he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense. But as pointed out

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4. ***See Trebilock, M. J. "The liability of company Directors for Negligence" (1969) 32 MLR 499. See also Nigerian case of Shonowo –V- Adebayo (1969) 2 ALR Comm. 419.***
5. ***(1925) Ch. 407 7 Supra.***

by Neville J. in ***Re Brazilian Rubber Plantations and Estates Ltd's*** **case,** [6] one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of duty which he is alleged to have neglected. For myself, I confess to feeling some difficulty in understanding the difference between negligence and gross negligence, except in so far as the expression are used for the purpose of drawing a distinction between the duty that is owed in one case and the duty that is owed in another. If two men owe the same duty to a third person and neglect to perform that duty, they are both guilty of negligence and it is not altogether easy to understand how one can be guilty of gross negligence and the other of negligence only.

But if it be said that of two men one is only liable to a third person for gross negligence, this and the other liable for mere negligence, this I think, means no more than that the duties of the two men are different. The one owes a duty to take a greater degree of care than does the other. If therefore, a director is only liable for gross or culpable negligence, this means that he does not owe a duty to

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6. (1911) 1 Ch. 425, P. 437

his company, to take all possible care. It is some degree of care less than that. The care that he is bound to take has been described by Neville J. in the case referred to above as "reasonable care" to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf.

In saying this Neville J. was only following what was laid down in ***Overend & Gurney Co. –V- Gibb***[7] Per Lord Hatherley, LC; as being the proper test to apply namely "whether or not the directors exceeded the powers entrusted to them, or if they did not so exceed their powers, they were cognizant of circumstances of such a character, so plain, so manifest and so simple of appreciation, that no man with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into".[8]

A major observation, to be drawn from the above extensive statement is that at common law, the judicial authorities do not take any definite position as to the extent of and degree of, care, skill and diligence to be exercised by a director in the discharge of his duties.

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7. (1872) LR 5 (HL) 480, P. 486 -487
8. (1925) Ch. 407 (Supra)

Rather, the solution must depend on the circumstances surrounding the particular directors and the companies involved. This means that a director will be judged by the skill which he holds out about himself. Hence Romer J. exposed the following three propositions in that famous common law case of **Re City Equitable Fire Insurance Co. Ltd.**[9]

The First proposition is that a director need not exhibit in the performance of his duties, a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.

A director of a life insurance company, for instance, does not guarantee that he has the skill of an actuary or a physician. Thus Lindley MR. said in the case of **Laguna & Nitrate Co. -V- Lagunas syndicate**[10] as follows:

> "If directors act within their powers, if they act with such care as is reasonable to be expected from them, having regards to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company".[11]

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9. (1925) Ch. 407 (supra)
10. (1899) 2 Ch. 392
11. Ibid at P. 435

The test here is a very simple one because it is partly objective and partly subjective as everything still boils down to the directors' yardstick.

The second proposition is that a director is not bound to give continuous attention to the affairs of his company. His duties are of intermittent nature to be performed at periodic board meetings and at meetings of any committee upon which he happens to be placed. The director is not, however, bound to attend all such meetings though he ought to attend whenever; in the circumstances, he is reasonably able to do so.

This second proposition is feeble and does not compel directors to attend meetings, though it imposes a duty on them to be in attendance and attentive at those meetings. It means that at common Law absenteeism from board meetings no matter the duration does not attract liability[12].

The third proposition is that a director may delegate his duties. With respect to the third proposition, Romer J. expressed that "In respect of all duties that, having regard to the exigencies of business and the articles of association, may properly be left to some other official, a director is in the absence of grounds for suspicion,

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12. See In Re Denhams & Company (1884) 25 Ch. D. 725; See also Re Marquis of But's case (1892) 2 Ch. 100.

honestly". This proposition approves justified in trusting that official to perform such duties delegation of duties by a director. It means that a director can appoint a nominee or a proxy to perform some specific duties on his behalf.

The above three broad principles of directors duty of care and skill were adopted by the Nigerian Supreme Court in the case of **Adebayo -V- Shonowo.**[13] In that case, the Supreme Court, per Coker JSC observed as follows:

> "To revert now to the four directors of the bank, we again observe that their liability must be ascertained by reference to the law as we had earlier on in this judgment explained. A director of a company is not expected to fill all the positions in the company himself and he should be entitle to assume that qualified staff are performing the duties of their offices with competence. He is certainly not expected to abdicate his responsibility but he is undoubtedly entitle to rely on the judgment of responsible assistants with the requisite knowledge, training and expertise. We do not think any inherent distinction lies in the duties and liabilities and categories of directors, but the chairman of the board of directors and the managing director may, by Articles of

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13. (1969) 1 All NLR 176

> Association of the company and must by the nature of their special access and connection with the detailed machinery of control be expected to know better than the other directors".[14]

This observation of the Learned Justice is self explanatory and need no further analysis as it encompasses the three propositions formulated by Romer, J in the celebrated case of **Re City Equitable Fire Insurance Co. Case**[15]

It sufices to mention here that the standard set is personal to the person in each circumstance. In **Re Brazilian Rubber Plantations and Estate Ltd,**[16] Neville, J. Stated as follows:

> "A director is, I think, not bound to bring any special qualification to his office. He may undertake the management of another company in complete ignorance of everything connected with rubber without incurring responsibility for the mistakes which may result from such ignorance. While, if he is acquainted with the rubber business he must give the company the advantage of his knowledge when transacting the company's business".[17]

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14. Ibid at P. 182.
15. (1925) Ch. 407 (supra)
16. (1911) 1 Ch. 425
17. Ibid at P. 437

Thus, at common Law, a director may safely be ignorant, inexperienced and lacking in judgment as long as he is honest and careful. This is because, the standard of care required from a director is subjective. It is a variable standard depending on the skill and knowledge of the particular director in question.

However, this common law position has been criticized in the report of the Nigeria Law Reform Commission on the Reform of Nigeria Company Law as follows:

> "The law merely required a director to exhibit a reasonable degree of care and skill of an ordinary man in the same circumstances. He is neither liable for an error of judgment nor is he bound to give continuous attention to the affairs of the company. Where he is expected to rely on their officers, he is not bound to monitor their conduct, except where he suspects fraud. Thus, a director is only liable for gross negligence and not for ordinary negligence.
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> There is no doubt that, a means should be sought to implore the standard on the board and to minimize areas of conflict".[18]

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18. ***See P 227 of the Report of the Nigerian Law Reform Commission (Supra).***

The foisting upon a company of a director who has no qualification whatsoever for his position could do serious damage to such a company. Thus, a person who voluntarily accepts the post of director ought to have a fair knowledge of what the company is engaged in.

In actual fact, it is not unknown for people to be appointed directors even though it is clear that they have only the vaguest idea of the business of the company.

In Nigeria, this has been a common phenomenon {prevalence practice} where many large corporations especially the expatriate controlled companies appoint Nigerians as directors not because of their knowledge of corporate operations but largely because of their connections with government or with some powerful force in the country.

In the discharge of their duties they {directors} will usually be exonerated from responsibility in respect of matters which subsequently prove to be unwise or unprofitable if there is evidence that they acted in good faith and that their actions were based on honest judgment of the situation.[19] Thus it has been respectfully submitted

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19. ***See Kekewich, J. in Re Second East Dulwich 745th Star – Bowkelt Building Society {1899} 68 L.J Ch. 190, P 198;***
Re Mercantile Trading Co., Stringer case (1869) L.R.4Ch. App 475 at 480; In Re Kingston cotton Mill {No 2} (1869) 1 Ch. 331 at 348; and Hutton –V- West Cork Railway (1883) 23 Ch. D 654 at P. 673.

that directors are required to exercise reasonable care in the discharge of their duties and in doing so must use their own judgment and not that of others.[20]

Flowing from this criticism is the provision of section 282 of the Act,[21] which clearly states the duty of care and skill expected of a director. In essence, the section incorporated the common law principle into the body of our company's legislation. But as will be seen subsequently, the provisions in our company legislation are far more exhaustive than the common law approach for, it adopts a formulation based on an objective standard. For the purpose of clarity, section 282 {1} provides that:

"(1) Every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interest of the company and shall exercise that degree of care, diligence and skill which a reasonable prudent director would exercise in comparable circumstances".[22]

By the provisions of section 282{2}[23] of the Act, failure to take reasonable care shall ground an action for negligence

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20. *See Olawoyin; G. A. "Status and Duties of Company Directors" (Supra). P. 35*
21. *CAMA Cap. 120 LFN 2004.*
22. *CAMA Ibid*
23. *CAMA Ibid*

and breach of duty. This follows the decision of the Nigeria Supreme Court in **Adebayo -V- Shonowo**[24] and the requirement that directors must exercise reasonable care, skill, and judgment and not reliance on the skill and judgment of others. It is respectfully submitted that a director, who places reliance on the skill and judgment of others and on that ground absents himself from board deliberations shall not be absolved from responsibility and liability arising there from.

Section 282 {3}[25] of the Act on the other hand makes each director "individually responsible for actions of the board in which he participated, and the absence from the board's deliberations, unless justified, shall not relieve a director of such responsibility".

The issue and most important point here is that it is incumbent on the director who absents himself to justify his absence from board meeting to absolve himself from liability. Justification will be found on the fact that directors are not required to give continuous attention to the affairs of the company. Hence the issue of reliance on experts becomes necessary. The experts are the agents of the company and directors may not be vicariously responsible for their error or misjudgment. They can only

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24. (1969)1 All NLR 176.
25. CAMA (Ibid)

be liable for personal negligence.[26]

Thus, a director cannot be guilty of negligence if he fails to supervise acts of a co-director whom he has no reason to distrust. The same goes to absolve them from liability in negligence, if they, act in reliance, on officers of the company whom they are entitle to trust and whose reports and statement misled the directors.[27]

However, absence due to sickness, unavoidable circumstances and reliance on competent and judgment of responsible and qualified staff may absolve a director from liability.[28]

The duty here does not create distinction between executive and non –executive directors. Thus, in the case of **Dorchester Finance Company Ltd -V- Stebbing**[29] where only one of the company's three directors, worked on full time basis, and the two part-time directors at the request of the working directors signed blank cheque used in giving loans which became irrecoverable, the court held the three directors liable despite the pleas of the other two

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26. *See Deji Sasegbon (supra) P. 442-445.*
27. *See generally cases of Huckerby –V- Elliot (1970) 1 ALLER 189; Dovey –V- Cory (supra) Re National Bank of Wales Ltd 2 (supra); Prefontaine –V- Grenier (1907) AC 101(PC).*
28. *Adebayo –v- Shonowo (supra), See also Cases and Materials on Nig. Company Law, P. 283*
29. *{1989} BCLC 498*

that as non –executive directors they were not liable.
These decisions was premised on the fact that the two non-executive directors were experienced accountants, and consequently their acts in signing the blank cheque was negligent and thus fall short of the necessary skill and care standard required of them.

Under Section 282{4} of the Act,[30] the same standard of care in relation to the director's duties to the company shall be required for both executive and non-executive directors with a proviso that additional liability and benefit may arise under the contract of employment (express or implied) between such executive director and the company.

In view of the codification of the standard of care and skill under Nigeria Companies Law, the new rule as opposed to the Common Law position is that the standard of care required from a director is now an objective one. That is to say that it is fixed standard depending on the skill and knowledge, a reasonable prudent director of his class would exercise if faced with similar circumstances. Thus, the Common Law position stated by Romer, J. in **Re City Equitable Fire Insurance Co. Ltd**[31] seems to be

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30. CAMA Cap 120 LFN 2004
31. (1925) Ch. 407; 40 TLR (Supra).

now outdated in view of the Provisions of section 282 of the Act.[32]

On the basis of the foregoing, the provision of Section 281[33] dealing with multiple directorships would seem to apply to the fiduciary duties and the use of corporate information, property and opportunity only and not the duty of care and skill.

However, the provision of section 282{4}[34] seems to recognize this fact by distinguishing between executive and non-executive directors with a proviso that where there is contract of employment, additional liability would attach to the executive position. Even then, the distinctions between executive and non-executive directors do not seem to cure the defect by not extending the standard of care to situation of multiple directorships. Believing that the above position is correct, the issue then is whether the fact that a person holds more than one directorship derogates from the duty of care and skill. It is respectively submitted that the answer must be in the contrary.

As has been stated above, the codification of the duty of care and skill under the Act[35] is stricter {i.e to say, it

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32. CAMA, 2004 (supra0
33. CAMA, 2004 Ibid
34. CAMA, 2004 Ibid
35. CAMA, 2004

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The rules became important and draws attention because it is admittedly extremely difficult or indeed, impossible for directors who are interested in a transaction with their company, to exercise an independent and unbiased judgment in the consideration of issue connected with the transaction. The loyalty of a director in such circumstance is, by the very nature of things likely to be divided.[47]

Today, this rule which appears to be confined to English Law seems to have become one of universal application[48]. In United States of America, Judge Allen of New York expressed in the case of **Abbot -V- American Hard Rubber Co.**[49] that "No principle is better settled than that a person having a duty to perform for others cannot act in the same matter for his own benefit".

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In the case of **Michoud -V- Girod,**[50] Wayne J. Stated and I quote as follows:

> "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity in this conflict of interest the law wisely imposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self interest, but it provides against the probability in many cases and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty".[51]

Thus, in another American case of **Globe Woolen Co. –V- Utica Gas and Electricity Co.**[52] a contract for the supply of electricity by U.co to G.co which was procured by a director of U.co who was also a director of G.co. It was held that U.co was entitled to avoid it, even though, its terms were prima facie fair because its operations would be very onerous to it.

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that directors are required to exercise reasonable care in the discharge of their duties and in doing so must use their own judgment and not that of others.[20]

Flowing from this criticism is the provision of section 282 of the Act,[21] which clearly states the duty of care and skill expected of a director. In essence, the section incorporated the common law principle into the body of our company's legislation. But as will be seen subsequently, the provisions in our company legislation are far more exhaustive than the common law approach for, it adopts a formulation based on an objective standard. For the purpose of clarity, section 282 {1} provides that:

"(1) Every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interest of the company and shall exercise that degree of care, diligence and skill which a reasonable prudent director would exercise in comparable circumstances".[22]

By the provisions of section 282{2}[23] of the Act, failure to take reasonable care shall ground an action for negligence

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Section 282 {3}[25] of the Act on the other hand makes each director "individually responsible for actions of the board in which he participated, and the absence from the board's deliberations, unless justified, shall not relieve a director of such responsibility".

The issue and most important point here is that it is incumbent on the director who absents himself to justify his absence from board meeting to absolve himself from liability. Justification will be found on the fact that directors are not required to give continuous attention to the affairs of the company. Hence the issue of reliance on experts becomes necessary. The experts are the agents of the company and directors may not be vicariously responsible for their error or misjudgment. They can only

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Thus, a director cannot be guilty of negligence if he fails to supervise acts of a co-director whom he has no reason to distrust. The same goes to absolve them from liability in negligence, if they, act in reliance, on officers of the company whom they are entitle to trust and whose reports and statement misled the directors.[27]

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Under Section 282{4} of the Act,[30] the same standard of care in relation to the director's duties to the company shall be required for both executive and non-executive directors with a proviso that additional liability and benefit may arise under the contract of employment (express or implied) between such executive director and the company.

In view of the codification of the standard of care and skill under Nigeria Companies Law, the new rule as opposed to the Common Law position is that the standard of care required from a director is now an objective one. That is to say that it is fixed standard depending on the skill and knowledge, a reasonable prudent director of his class would exercise if faced with similar circumstances. Thus, the Common Law position stated by Romer, J. in **Re City Equitable Fire Insurance Co. Ltd**[31] seems to be

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On the basis of the foregoing, the provision of Section 281[33] dealing with multiple directorships would seem to apply to the fiduciary duties and the use of corporate information, property and opportunity only and not the duty of care and skill.

However, the provision of section 282{4}[34] seems to recognize this fact by distinguishing between executive and non-executive directors with a proviso that where there is contract of employment, additional liability would attach to the executive position. Even then, the distinctions between executive and non-executive directors do not seem to cure the defect by not extending the standard of care to situation of multiple directorships. Believing that the above position is correct, the issue then is whether the fact that a person holds more than one directorship derogates from the duty of care and skill. It is respectively submitted that the answer must be in the contrary.

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44. (1887) 12 APP. Cas. 589

45. Ibid P. 593.

in relation to a trust. And that in consideration of matters relating to itself, the company should have the benefit of the unbiased and independent judgment of each director and that the opinion of even a single one of them may go a long way in helping the company and safeguarding its interest.[46]

The rules became important and draws attention because it is admittedly extremely difficult or indeed, impossible for directors who are interested in a transaction with their company, to exercise an independent and unbiased judgment in the consideration of issue connected with the transaction. The loyalty of a director in such circumstance is, by the very nature of things likely to be divided.[47]

Today, this rule which appears to be confined to English Law seems to have become one of universal application[48]. In United States of America, Judge Allen of New York expressed in the case of **Abbot -V- American Hard Rubber Co.**[49] that "No principle is better settled than that a person having a duty to perform for others cannot act in the same matter for his own benefit".

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46. *See Imperial Mercantile Credit Association –V- Coleman (1871) L.R 10 Ch. App. 558 P. 568. see also Boulting –V- ACTAT (1963) 2 Q.B 606 P. 638*
47. *See dictum of Lord Cairn, L.C in parker -V- Mckenna (Supra)*
48. *In Aberdern Railway Co. –V- Blaikie Bros.(1854) (supra) Lord Cranworth L.C refers to it as a of universal application see also Innes CJ.. in Robinson –V- Round Fontein Co. Estate Gold mining Co. Ltd (1921) AC. 68. .See also Lord Eldon in Gibson –v- (1801) 6 Ves. 2661*
49. *33 Barbour 578*

I quote as follows:

> "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity in this conflict of interest the law wisely imposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self interest, but it provides against the probability in many cases and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty".[51]

Thus, in another American case of **Globe Woolen Co. –V- Utica Gas and Electricity Co**.[52] a contract for the supply of electricity by U.co to G.co which was procured by a director of U.co who was also a director of G.co. It was held that U.co was entitled to avoid it, even though, its terms were prima facie fair because its operations would be very onerous to it.

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50. (18460) 4 How 503,

51. Ibid P. 55. See also Field J. in Warsndell –V- Union Pacific R.R. Co. (1880) 103 US 651, P. 658

52. (1918) 224 N.Y 483; (1918) 12 N.E 378

The essence of this principle is that a company will not be responsible for any contract or transaction which has been entered into by its directors, or through its directors as agent of some other person since the director's position would be such as to prejudice, or likely to prejudice, the honest and full discharge of his obligation.

This rule seems to have been extended to situations where the conflict is not between the interest of the director and his duty to his company, but between one fiduciary obligation of the director and another. Thus, in the case of **Transvaal Lands Co. –V- New Belgium (Transvaal) Land and Development Company**[53], it was said in the judgment that:

> "Where a director of a company has an interest as a shareholder in another company or is in a fiduciary position towards and owes a duty to another company which he is proposing to enter into engagement with the company of which he is a director, he is, in our opinion, within the rule. He has a personal interest within this rule or owes a duty which conflict with his duty to the company of which he is a director"[54]

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53. *(1914) 2 Ch 488*
54. *Ibid 503; See also Lord Denning M.R in Boulting –V- ACTAT,(1963) 1 QB.606 P.626*

Therefore, in the traditional sense, conflict of interest would mean where the personal interest of a director conflicts with any of his duties as a director. The interest in question here need not be direct or personal but must be sufficient to bring a director within the rule. In **Todd -V- Robinsons**[55] it was decided that a shareholder owning a very significant interest in a company was "interested" in contract entered into by that company.

The conflict may arise in various circumstances between the duty of a director to his company on one land, and his interest or duty to some other person or body on the other hand. It may be that there is a straight deal where the director is the direct second party to the transaction. A more usual situation is a sale of a property by a director to his company, or purchase by him of the company's property. Here the company is entitled to avoid the contract because of the conflict between his fiduciary duty and his interest as either the seller or vendor or purchase of the property.[56] As has been seen in the case of **Transvaal lands Co. -V- New Belgium (Transvaal) Land Development Co**[57]. A conflict of duty will still emerge

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55. *(1884) 4 Q. B. D 739*
56. *See Dia Nasar –V- Berimi Bank Ltd (1969) 2 ALR (Comm) 32. (1968) NCLR 20 it is to be noted that this case re-affirmed that reported in (1976) 2 ALR (Comm) 78.*
57. *(1914) 2 Ch. 488 (supra)*

even where that director is a shareholder in another company, which contracts with the company of which he is a director. His interest as a shareholder in the second company has been held to be capable of so affecting his judgment in regard to such transaction.[58]

This rule is applicable to partnership situations where a director of a company is also a member of a firm of partnership, which enters into contract with his company. This is because there will definitely exist a conflict between his fiduciary duty and his interest as a member of the firm or partnership.

A more complicated situation is where a director is on board of two or more companies engaged in certain transaction among themselves. It is very certain that the duty of such a director to one of the companies must is ideal that the contract is avoided. Thus, the America court necessarily be in conflict with his obligation towards the other. Here again it finds no hesitation in voiding the contract in the case of **Globe Woolen Co. -V- Utica Gas & Electricity Co.**[59]

Another important issue here is whether the rule is applicable to nominee directors. If has been submitted that

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58. (1914) 2 Ch. 488 (supra) P. 497
59. (1918) 2 N.Y. 483: (1918) 12 N.E 378. (supra).

when a particular interest nominates a person to the board of the company, the director so nominated should be considered interested in a transaction between his nominator and the company[60]. In fact it is difficult to see how the judgment of the nominee director can be unbiased.

To digress a little, let us look at the position of holding company and its subordinates. The situation is even worse in the relationship between a holding company and its subordinate, where the holding company tends to have indirect absolute control and influence on its subordinates. The board of the subsidiaries in practical terms can never act independently. Infact, the decision of the English Court of Appeal **in Lindgren -V- L&P Estates Ltd**[61] that a director of holding company is not bound to protect the interest of one of its subsidiaries with independent BoardS on the ground that the director of the holding company owed no duty to the subsidiary should not be taken as representing the general statement of the law.

The reasons is that it is certainly unrealistic to refer to the directors of a subsidiary company as independent if the word is meant to convey the idea that the board of the subsidiary is independent of the parent company. The word 'subsidiary' suggest an amount of dependence and in

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60. See G. A Olawoyin "Status and Duties of Company Directors P. 48
61. (1918) 2 WLR 563

practical terms the influence of a holding company on its subsidiary is almost invariably immense. So the idea that a subsidiary company could have a board independent of its holding company is surely a myth.

It is submitted that the idea that a subsidiary company could have an independent board runs contrary to the spirit and interest of companies legislation. By definition, director has been defined as including "any person in accordance with whose directions or instructions, the directors of a company are accustomed to act. The directors of the company are often required to act in accordance with the instructions or directions of their parent company.[62]

So, if any view is held that where a subsidiary company is wholly owned, the holding company owes it certain duties, the breach of which could give rise to penalties, would only be of the theoretical value since in practice if the wrong done by the holding company results in any harm to the subsidiary, it is bound to be self inflicted. Thus, the relationship in terms of control a holding company exercise over its subsidiaries was given full recognition by the House of Lords in **Unit Construction Co. Ltd-v-Bullock.**[63]

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62. See Brown, "Company Directors (2nd Ed.) P. 8; See also Wallace & Young, Australia Company Law and Practice", P. 32.

63. (1959) 3 ALLER 831

In that case, an English company had three wholly owned subsidiaries registered in Kenya. The composition of the boarding of the subsidiaries was entirely distinct from that of the boarding of the holding company. But the real control and management of the affairs of the subsidiaries was in the hands of the board of the parent company. The question was whether the Kenya companies were resident in England. The answer depends on the location of the management of the companies business. The House of Lords held that the companies were resident in the United Kingdom because the actual control of their management was by the board of the English company. The reality of the situation which is the control of management by the board of the English Company formed the basis of the decision.

In interlock and multiple situation, the usually strong position of a holding company is one capable of being misused to the detriment of the subsidiary.[64]

Coming back to our discussion, the most important thing, in any of the situations which conflict of interest may arise, is that where a conflict exist between the interest of a director and his duty to the company or between one obligation and another, the court may not concern itself

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64. See Scotiish Coop. Wholesale Society –v- Meyer (1958) 3 WLR 404 (1959) AC 324

with the merits or otherwise of the terms of the transaction, but the existence of actual conflict of interest.

In the case of **Imperial Mercantile Credit Association – V- Coleman**[65] where the director of a company was also a member of the firm of stockbrokers which sold to the company a contract for placing railway debentures at a price considerably higher than that at which his firm had agreed to place them for the railway company, the House of Lords order the director and his firm to refund to the company the entire profits made by them with interest.

Thus, in the course of management of affairs of the company, or in the use of the company's property, directors are prohibited from making secret profits or achieving other unnecessary benefits. This is the classical principle enunciated in the celebrated case of **Aberdeen Railway Co. -V- Blaikie Brothers**[66] where the main issue was whether a company was entitled to avoid a contract between itself and a partnership of which one of the directors was a partner and there was no dispute as to the fairness of the contract. In the case, Lord Cranworth said as follows: -

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65. (1873) 42 L.R Ch. 644

66. (1854} 1 Macq H. L. 461. See also Waynes J. in America cases of Michound –V- Girod {1846} 4 How. 503 II L. Ed. 1076. this principle does not entitle the other party to enforce it aginst the company: see Hely Hutchinson –V- Bradhead Ltd {1968}QB. 549

> "A corporate body can only act by its agents, and it is, of course the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge shall be allowed to enter into engagement in which he has, or can have, possibly a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. So strictly is the principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into".[67]

Another issue raised from the above judgment is the issue of fairness. Does it mean that the court will uphold or reject a transaction on the basis that it was fair or unfair. The basic rule is that a transaction entered into by a director with his company in circumstance in which his personal interest conflicts with his duty to the company is not binding on the company whether or not the transaction is fair. In both situations the director is made to account for the profits made by him from the transaction.

In **Imperial Mercantile Credit Association -V-**

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67. Ibid. P. 471

Coleman[68] the court rejected the argument about the fairness of the terms of the transaction. Thus, the argument that the company was not entitle to the profit or could not have earned it was immaterial.[69]

It is to be noted that this equitable principle has remained largely unchanged by judicial pronouncements despite the criticism that the application of the rule will create full rigour to directors as trustees.[70] The general principle of the rule is that unless the shareholders in a general meeting have excused the directors by waiver or ratification, he must avoid situations of potential or possible conflict of interest or the company will have a cause of action for breach of duty against him[71]. It has no accommodation for the argument that it is extremely difficult, or indeed or impossible for the directors who are interested in a transaction with their company to exercise an independent and unbiased judgment in the consideration of issues connected with the transaction[72].

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68. (1873) 42 L.R. Ch. 644, P. 653

69. 69. See Vanghan Willams, J. In Costa Rica Railway Co. Ltd –V- Farwood (1901) 1 Ch. 746 P. 761; Roskill, J. In Industrial Development Consultants –V- Colley (19720 1 WLR 443 p. 453

70. See Sealy "The Director as Trustee" (1967) CLJ. 83

71. See Skinner op. Cit. P7, See also Thomas Marshall (Exporter) –V- Guinley (1978) 2 WLR 116.

72. See Lord Cairns L.C in parker –V- Mckenna (1874) LR 10 Ch. App 96

The above position forms a very important exception, hence a distinction between fair and unfair transaction becomes very vital. A fair transaction may be ratified at the general meeting or controlled by director possessing majority voting power, [73] while unfair cases would not attract ratification as it might constitute fraud on the minority.

This equitable principle has found statutory expression in section 280 of the Act[74] where apart, from stating Generally that the personal interest of a director shall not conflict with any of his duties as a director, it goes further to provide that such a director shall be accountable to the company for any secret profits made by him or unnecessary benefits derived by him under Section 280 sub-section {2}.[75] The inability or unwillingness of the company to perform any function or duties under its articles and memorandum of association shall not constitute a defense to any breach of the duty of a director under the Act.[76] The breach of the duty lies in the fact of conflict and making of profit in the course of one's employment as a director.

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73. *See North Transportation Co. Ltd –V- Beatty (1887) 12 App. Cas. 589*
74. *CAMA CAP 120 LFN 2004*
75. *CAMA Ibid. See also s. 280(3) and 287 ibid*
76. *See Section 280 of CAMA Cap 120 LFN 2004 See also Regal (Hastings) Ltd –V- Gulliver (supra) Canada Aero service –V- O'Malley (1973) 40 CLR(31), and Cook –V- Deeks (1961) AC 554.*

The case of **Regal Hasting Ltd -V- Gulliver**[77] provides an elucidatory illustration on this subject. In that case, the company was unable for lack of funds to subscribe fully for the shares of a subsidiary formed to take over a business belonging to a third party. In order to provide the necessary capital, the directors resolved to subscribe for most of the shares themselves. As a result, they made substantial profit through the sale of the shares contemplated by the scheme. The House of Lord held that the directors were liable to account for the profits so obtained by them. This is notwithstanding the fact that the directors had acted bonafide in all the transaction, which resulted in the making of the profit. Their Lordship in the House of Lords said as follows:

> "The rule of Equity which insist on those who by use of a fiduciary position make profit being liable to account for that profit, in no way depends on fraud, or absence of bonafide intention. The liability arise from mere fact of a profit having been made, the profiteer, however, honest and well intentioned, cannot escape the risk of being called upon to account".[78]

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77. (1967) 2AC 134 (Supra)
78. Bid P. 147

From the above it follows that the rule is absolute and independent of any question of fraud or absence of good faith.[79]

In order to establish breach of this duty the secret profit or benefit made by the directors must be in the course of affairs of the company or in the utilization of the company's property. It is hereby submitted that secret profit, here embraces all profits made by a director without the knowledge of his company in which he should have laid it before the company and obtain consent.

Thus to establish secret profit, it is not necessary that a company must have suffered actual loss as a result of making secret profit or unnecessary benefit from the use of the company's asset. In the case of **Re North Australian Territory Company, Archer's case,**[80] the court considered whether a company could recover a secret profit made by its directors in a situation where the company had not suffered any actual loss as a result of the directors actions. The court imputed a notional loss to the company and decided that it was entitled to such profit notwithstanding the absence of actual loss. In fact, it has

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79 .See parker –V- Mckenna (supra) where directors had to account for profits made in dealing with new capital of the company; Cockburn –V- New Bridge sanitary Steam Laundry Co. Ltd and Llewellyn (1915) 1 IR 237 (CA) and Boardman –V- Phipps (1967) 2 AC 46

80. (1892) 1 Ch. D. 322

been recognized that in such situation, a director is bound to surrender to his company all "secret profits, received by him by reason of his position whether the company has a propriety interest or moral claim to them or not.[81]

The inability or unwillingness of the company to perform any functions or duties under its articles and memorandum of association shall not constitute a defense to any breach of duty of a director under the Act.

Similarly, under Section 280{5} of the Act,[82] the duty not to misuse corporate information shall not cease because a director or any officers might have resigned from the company, and he shall still be accountable and can be restrained by an injunction from misusing the information received by virtue of his previous position.

In **Industrial Development Consultants Ltd -V- Cooley**[83] the director was asked to conclude a contract on behalf of his company. He resigned from the company on the ground of ill health. This was to enable him divert the contract to himself. Even though the company would not have gotten the contract, the court held that he has abused

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81. *See Reading –V- A. G (1951) AC 507; See also A. G. –V- Goddard (1929) 98 LR.K.B 743*

82. *CAMA (Supra)*

83. *(197) 2 All ER 162; see also Cook-V- Deck (1916) AC 554; See Canada Aero Service Ltd-v- O'Malley(supra) and Board Man v- Phipps (supra).*

his position and was accountable to the company for the profit made.

In the application of the rule that directors must not engage in transactions in which their interest conflicts with their duties, the court have always allowed for an exception under which such transaction can be sustained. The exception is proper disclosure by the director of his interest[84]. The law thus recognizes exception to the general rule provided under section 280 that there must not be a conflict between interest and duties of a director. Thus, proper and sufficient disclosure of director's interest by the director in the transaction with or entered into on behalf of the company is the second exception.

In **Industrial Development Consultant Ltd. -V- Cooley** [85] it was also held that the director was in breach of fiduciary duty to the Plaintiff for not disclosing to them, while managing director, the discussion pursued for his personal benefit with a Gas Board and that he was therefore liable to account even under a new employment.

It must be made clear that while section 280 generally looks at the utilization of company properties, the

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84. See S. 280 (6) CAMA. See also Parker-V- Mckenna (supra) and Dis Nasir –V- Berini Beriut Riyad (Nig) Bank ltd (1968) NCLR 20

85. (1972) 2 All ER 162 (supra)

provisions of section 277 of the Act makes it mandatory for a director who has interest in a contract with the company to disclose his interest[86]. It suffices to Point out that section 277 does not validate the contract as it has to be ratified by the general meeting before it is valid.

It must however be noted that the disclosure is to the board and not the general meeting of shareholders. Equity requires that the disclosure by the director should be at the general meeting so as to give it opportunity to ratify or reject the transaction. A disclosure made by a director to his colleagues on the board is not acceptable in law, even if the director making the disclosure refrains from attending the board meeting to allow an independent quorum to take decision. This is because the company is entitled to the unbiased and independent judgment of every director.

Thus, where a director discloses his interest before the transaction and before the secret profits are made before the general meeting, which may or may not authorize any resulting profits, he may be absolved from liability. He may not however be absolved from liability, if he discloses only after he has made the secret profits in which case, he shall account for the profits.

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86. CAMA Cap 120 LFN 2004

Section 277 appears to impose a lesser duty of disclosure as against section 280 {6} which makes it mandatory that disclosure must be to the general meeting. The question then, would be: what happens if the general meeting cannot be convened and there is cause to invest immediately? Supposing the investor is a mere officer and not a director. In this situation, it is respectively submitted that the board can, if it deem fit, authorize the officer to invest. If it is a director, the board can equally confer authority.

Thus, in the case of **Queensland Mines Ltd -V- Hudson** [87] the board of the company knew of the facts and decided to renounce the company's interest, and authorized the managing director to invest at his own risk and for his own benefit. It was held that the managing director was not liable to account even though he took part in the decision. In this situation, it is ideal and safer for a director to declare his interest and withdraw from the meeting, not withstanding the fact that a director with a very powerful and influential personality can still influence his colleagues on the board.

In any case, the disclosure must again be to the meeting of the full board of directors, for a disclosure to a sub –

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87. (1978) 52 ACLR 379, see also Section 317 of English Company Ac, 1985

committee of the board may not meet the statutory requirement.[88] It would be immaterial that all board members were aware of the interest in question, if the disclosure is not to a duly convened board meeting.

In the United States of America, the position appears to be slightly different in that disclosure can be made to the board of directors or to a committee of the board of directors.

Flowing from the foregoing, it can safely be submitted that if a general meeting cannot be convened immediately, the boards' decision should subsequently be reported to the general meeting for ratification.

The dilemma a director may face under our company statue is that the law only provides that he can escape liability where the disclosure of the transaction is first made to the general meeting and not to the board. In this regard, the provision of the Act has failed to take advantage of the decision in **Peso Silver Mines Ltd –V-Cropper**[89] where it was held that the rejection of the transaction by the company entitles the director to utilize the opportunity.

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88. See Revised Model Business Corporation Act, 1984("The Model code")
89. 89. (1966) 58 DLR (20) 1.

The bottom line of this discussion is that by the provision of Section 281 of the Act,[90] interlocking directorate or holding of multiple directorships by a person does not preclude him from derogating from fiduciary duties to each company. He also must not use the property, opportunity or information obtained in the course of the management of one company for the benefit of the other company or to his own or other person's advantage. A violation of any of the provisions of the law may not likely absolve the director from liability even in situation of interlocking directorates.

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90. CAMA 2004

CHAPTER FIVE

CONSEQUENCES OF MULTIPLE DIRECTORSHIP ON CORPORATE GOVERNANCE

5.1 Introduction:

To become a director and consequently a member of the board of directors of a corporation is a privilege that equally has corresponding responsibilities. The Nigerian Company Law[1] has described directors of a company as persons duly appointed by the company to direct and manage the business of the company. The legal duties of those directors have been spelt out to include the following among others[2]:

1. Acting in a fiduciary relationship towards the company and accordingly shall observe the utmost good faith towards the company in any transaction with it or on the company's behalf.
2. Acting at all times in what he believes to be the best interest of the company as a whole so as to preserve its assets, for their business, and promote the purpose for which it was formed and in such a manner as faithful, diligent, careful and adversely skillful director would act in the circumstances.

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1 *S. 244 of CAMA, LFN, 1990*
2 *S. 279, CAMA, LFN, 1990*

The law further provides that in the performance of these duties, the directors must take into account the interests of the company's employees in general as well as the interests of its members. In the exercise of his powers the director is enjoined to do so for the purpose for which he is specified and shall not do so for a collateral purpose which would not constitute a breach of his duties, if it incidentally affects a member adversely. It suffices to mention that a breach of any of the duties makes the director liable and no provision either in the articles or the resolutions of the company can absolve the director.

On the other hand, as has been stated in chapter one, corporate governance could be seen from various perspectives, roles and responsibilities of directors, especially in relation to the stakeholders theory and the very goals of corporate governance, the essence, of which is the promotion of fairness, transparency and accountability in the running of corporations and companies.

The Cadbury committee has succinctly expatiated this essence of corporate governance in its report as follows:

> "Boards of directors are responsible for the governance of their companies. The shareholders' role in the governance is to appoint the directors

and the auditors and to satisfy themselves that an authoritative governance structure is in place. The responsibilities of the board include setting up the company's strategic aims; proving leadership to put them into effect; supervising the Management of the business and reporting to the shareholders on their stewardship. The board's actions are subject to laws, regulation and the shareholders in general meeting.[3]"

The intriguing issue is what guarantee exists to ensure that within ethical professional and legal standard, directors of companies behave honestly, equitably and transparently towards all shareholders and towards each company. The duty of directors is therefore highly related to corporate governance and it is on this basis that it has become imperative to examine and determine the consequential effects of interlock where a director in a fiduciary holds multiple directorships in companies.

Indeed, questions of policy and management relating to companies depends largely on the business judgment of directors even if there are gross or serious errors to show

3. ***See Cadbury Committee Report on the financial aspects of corporate governance (Gee 1992) P. 25***

their unfitness or incompetence to manage the affairs of the company . Thus, corporate management centers on transparency, loyalty and good faith and the danger of bias and conflict of interest and duties that may emanate from the director's conduct in overseeing the affairs of the company.

This raises the fundamental question of how would the phenomenon of interlocking directorates and multiple directorships affect the directors' ability to observe the fiduciary duties of loyalty and good faith to the individual companies and their shareholders. In other words, how does interlocking directorate affect corporate governance especially, in terms of accountability, transparency and good governance.

The preceding chapter dealt with the fiduciary duties of skill and diligence as well as conflict of interest in contracts with the company, use of company's property, opportunity and information and whether the director in such a position has observed transparency, loyalty and good faith, due care and skill devoid of bias and negligence in running the affairs of the company. This chapter looks at the consequential effects of interlocking and multiple directorships on the running and management of companies generally and Nigeria in particular.

5.2 Positive Effects of Interlock

As it is common with every concept, there are arguments for and against the practice of interlocking and multiple directorships in corporate governance. The major argument in favor is that the pool of highly qualified and proficient directors required in the management of companies is so small that the practical duties of directorial quality inevitably result in their overlapping on company boards. Thus, in so far as there would be scarcity of management talents, making services of competent administrators available to more corporate organizations overcome the problem that will be posed by the scarcity.[5]

The principle behind this is the general belief that commercial affairs should be left to be determined by business corporations. For this reason, it has always been advanced that the courts and the legislatures should resist the temptation to "fix that which is broken". Professor Gower, in throwing his supports for this principle observed as follows:

> The judges have faced one further difficulty. Whereas their training and experience make them well equipped to adjudicate on questions of loyalty

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5. ***See Report of staff of the Antitrust Sub –committee of the Committee on the Judiciary House of Representatives 89th Compress, 1st Session Report on Interlocks in Corporate Management {Comm. Print, 1965} at 7 referred to in this works as "Staff Report".***

and good faith, they move with less assurance among complicated problems of economics and business administration. Hence they display an understandable reluctance to interfere with the director's business judgment, reluctance of which many examples will be found throughout the whole area of Company Law. Perhaps, too, they are conscious of the possible unfairness of a attempting to substitute their hindsight for that director's foresight and are therefore unwilling to condemn directors even though events have proved them wrong.[6]

The Privy Council illuminated this position in the case of **Howard Smith Ltd -V- Ampol**[7] where it held that there is no appeal on merits from management decisions to neither court of law nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

Another school of thought that believes in the positive effect of interlock maintains that it facilitates efficient transfer of information {raw data and managerial advice} for investment decision. These efficiencies it is argued, lower the transaction costs for investment, thereby increasing the return on investment[8].

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6. *Gower, Op. Cit, P. 586*
7. *{1974} App. Cas 821*
8. *See Skinner D, Op Cit P. 11*

Similarly, the Anti thrust sub-committee of the committee on judiciary in its report titled "Staff Report" further expanded the argument for optimal use of directorial talent as follows:

> "A qualified man has the capacity to act effectively for several corporations, and the experience gained in handling the problems of one rebounds to the advantages of others. By virtue of this, a director may be more valuable to any particular company because of his experience in other companies .....Another area in which a common director may be beneficial to business is where there is need to obtain information in order to protect an investment or other substantial financial commitment".[9]

The report emphasizes the fact that the complexity of modern corporate business demands that every effort be made to utilize the skill ad ability of those who have intimate and expert knowledge of matters relating to companies. The presence of such people on the board of several companies should be generally considered to be the benefit of all parties concerned. The general acceptance of this position in law has been highlighted by Bearle and Means[10] as follows:

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9. ***Staff Report (Supra) note 5 Loc Cit P. 160***
10. ***Bearle and Means, the Modern Corporations and Private Property {1932} p. 231 note 15.***

> "A director especially, if he is an important man financially, will have a dozen more interests all going at once. Many directors are elected frankly because they have interest in other corporations whose activities may complement those of other corporation electing him. In other words, the corporation, except to transact business with each other or in the same field, to their mutual advantage and the very duality of interest of the director is thus turned to the advantage of both".

Here Bearle and Means placed emphasis on the commercial benefit that may accrue to the companies as a result of the recognition and practice of the concept of interlocking directorships. It is however, submitted that such information should be guided so as to prevent insider abuse. Thus, in the absence of any agreement to the contrary, seemingly, nothing prevents a director from placing his added experience and general skill acquired in the cause of his employment in his company at the service of another. This is so whether or not this occurs during the subsistence of the director's employment in the first company provided that it does not include trade secrets and confidential information relating to it.

Thus, the concept of interlocking or multiple directorships seems to have become a generally accepted and welcomed

practice by business communities. The inclusion of the provision of Section 281 in our companies legislation was in absolute recognition of this concept.

5.3 Negative Effects and Consequences

As beautiful as the arguments for the acceptance of the concept of interlocking directorates and multiple directorships might be, the facts still remain that a person who holds several directorships may be faced with a number of competing demands by the different companies on which he is on their boards even, if they all belong to the same group. In this situation, it would seem impossible to keep the fiduciary duties of loyalty owed to each of the companies by a director remain undivided. In addition, there may be a serious risk that ones action may be such to subordinate the interest of some other companies on whose boards one sits to those of first or other companies. This, may constitute an oppression of the minority interest under section 201 of our companies Act. [11]

Lord Denning in seeing this danger, gave a warning as far back as 1958 when he remarked in the case of **Scottish Co-operative wholesale society -V- Meyer**[12] as follows:

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11. CAMA, Cap 120, LFN 2004
12. {1958} 3 WLR 404

"Your Lordships were referred to Bell –V- Lever Brothers Ltd Where Lord Bladensburg said that a director of one company was at liberty to become a director also of a rival company. That may have been so at that time. But it is at the risk now of an application under Section 210, if he subordinates the interest of the one company to those of the other".[13]

From the foregoing, it seems impossible for a person holding multiple directorships to discharge his duties, properly to each of the several companies he serves on their boards as a director. [14]For, a holder of a multiple of directorships may be tempted to abuse his position.

Thus our Law makers seem to have adopted and include the concept in our company law in a straight jacket form without properly evaluating the effect, the practice of it, will have on the management and the running of the affairs of a company. This is so because the recognition by our company Law notwithstanding, modern corporate management practice seems to have proved that the concept is not without some far reaching consequences and effect in relation to corporate governance as will be shown below.

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13. ***Ibid, P. 432-433. Note that Bell –V- Lever Brothers Ltd referred to in the judgment is reported as (1932) AC 616.***
14. ***See Sidebottom –V- Kershaw, Leese & Co. Ltd, {1920} 1 Ch. 15.***

Manipulation Of Company's Financial Statement

One dangerous possibility identified is that for a large number of companies operating under the same or predominantly the same directors which are not related as holding and subsidiary companies, could manipulate the books to give a false impression of their financial stability by intercompany borrowing and book transactions. To facilitate this, they will usually avoid preparing group accounts. In such situation, it has been said in an attempt to perpetuate fraud, one small group of individuals can thus form tens and hundreds of companies which are independent only in the sense of being separate persons, but which have no capacity for independent decision[15].

Such practice, it is submitted, will produce a chain of interlock or multiple directorships which will facilitate the fraud.

Thus, one cannot, but agree with professor Olawoyin's argument that it can hardly be over emphasized that if a person holds a multiplicity of directorship, he may be well tempted to abuse his rights.[16]

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15. *See Memorandum of British Board of Trade, in the "Minute of Evidence" P. 1574*
16. *Olawoyin; G. A. Op. Cit P.166*

5.5 Debasement of Management Pool

Referring to the "talent scarcity" theory developed to justify interlocking multiple directorships, it has been argued that interlock contributes to the debasement of the quality of the management pool and actually decreases or restricts the size.[17]

It would be such that the perpetuation of the process of recruiting directors from a stagnant pool of notables will leave equally or more talented, but anonymous candidates languishing in the corporate banks. In the case of quantity of qualified directors, it is very possible that extensive interlock may foreclose opportunity of younger executive from gaining experience as directors, which experience they require to become skillful qualified directors.[18]

This practice may have the effect of decreasing directorial quality, because a director serving on multiple boards may be too busy to serve any one effectively. Above all, there is the possibility of conflicting interest emerging such that the director is unlikely to have sound and balanced judgment in conflict situations.

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17. *Idongie; P. O. Op. Cit P 80*
18. ***See generally Morpohy R.P., "Keys to Unlock the Interlock: Dealing with Interlocking Directorates" II U. Mich.J. Laws Reform 361 (1978).***

For instance, in the subsequent case of **Hival Ltd -V- Park Royal Scientific Instrument Ltd**[22]. It was held that the duty of fidelity flowing from the relationship of employer and worker may preclude the worker from engaging, even in his spare time, in work for a competitor. This is notwithstanding that the workers duty of fidelity imposes more obligation than the full duty of good faith owed by a director or other fiduciary agent. Thus the concept that a director must not be prevented from serving on the boards of several companies should not be extended to situation where the business of the companies concerned is highly competitive.

Put simply, it means that if the business of two or more companies is highly competitive, the acceptance of directorship on the board of one should be made a disqualification to be on the board of the others. Idongie[23] has argued here that it is not likely that such a director would serve both companies with equal loyalty and good faith. In his view, the anti-competitive effect of interlocks will affect the economy as a whole, whether horizontally or vertically interlocked. Where the interlock is indirect, the effect may not be that pronounced but it can indirectly lead to breach of the fiduciary duty of loyalty and good faith.

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22. (1946) Ch. 169.
23. Idongie, P. O. op cit P. 80

What is being said here is that, assuming that a director in companies X and Y discloses information to another director of company Z who is also a director of company P, a competitor of company X, that director of companies X and Y is in breach of his fiduciary duty to company X not to disclose confidential information even though, company Y is not a competitor. It is thus submitted that there could be high possibility of cartelization leading to monopolistic tendencies.

Therefore, interlocking directorship or multiple directorships can give rise to a situation in which a director will compete with his company, where he has a private business or is associated with a company on whose board he serves, in which case conflict of interest would certainly be unavoidable.

5.7 Issue of Inter-Corporate Contracts

Interlocking directorate, as a by-product of multiple directorships could lead to serious problems in relation to inter-corporate contracts. For instance, a director A is a member of the board of two companies B and D that want to contract with each other. A happens to be the main negotiator on behalf of B. It is certain that in such a situation, A's allegiance is bound to be divided and also quite possible that he may even subordinate the interest of one company to those of others.

It is submitted here, that in situation such as this, his interest in each of the companies is likely to influence his attitude, such that one will profit at the expense of the other.

5.7 Loyalty / Good Faith

The next issue to consider is the requirement that directors of companies shall exercise their powers and discharge the duties of their office honestly, in good faith and in the best interest of the company and shall exercise that degree of care, skill and diligence which a reasonable prudent director would exercise in comparable circumstance.

The above issue raises two questions namely:

a) How can a director in interlock or multiple directorships exercise his powers and discharge the duties of his office honestly in good faith and in the best interest of the company without exhibiting conflict of interest.

b) The second question is how a director in interlock or multiple directorships can exercise that degree of care, skill and diligence which a reasonable prudent director will exercise in a comparable circumstance.

For a director to be said to have acted in the best interest of the company, he has to be diligent, faithful, careful and ordinarily skillful, preserve the company's assets, further

its business and promote the purpose for which the company is formed.

It seemed that section. 279 {3} of CAMA[24] confers on the director immense discretion. This relates to discretion to exercise measurable care and skill and not of others in their judgment. But can the Director in interlock or multiple directorships not abuse this discretion?

It is humbly submitted that abuse of discretion by such director is very possible. For instance, in the case of the use of power for proper purpose which requires exercise of the power not for any collateral purpose, the likelihood of bias is very high where a director is on the board of two different rival companies. The remedy available is not adequate enough to deter a director holding multiple position from committing breach of duty to the detriment of other stakeholders of the company.

As has been pointed out, a director can only exercise his powers for the purpose for which they are conferred. But, exercise of such power will be improper purpose if it is to feather the directors own nests or preserve his control of the company in his own interest. This will be a breach of duty to act in good faith and to promote the success of the company. The test of improper purpose is an objective

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24. CAMA, Cap. 120 LFN 2004

one, for a director might have acted honestly to promote the interest of the company, but, may nevertheless be in breach of duty if the power is exercised for purpose outside those for which the powers were conferred[25]. The point being made is that action for exercise of power for improper purpose at common law is only viodable but not void.

Again, section 282 of CAMA[26] also requires much more attention, care, skill and diligence from company directors. They should be prudent businessmen and not otherwise.

The provision of section 281 of the Act is a rejection of the common law position, that a director need not exhibit greater degree of skill than is reasonably expected from a person of his knowledge and experience; that he is not bound to give continuous attention to the affairs of the company; and that a director may delegate his functions in performance of his duties as a director.[27] The provision introduces an objective reasonable director standard test for breach of duties of director, thus abolishing the ridiculous low duty of care and skill laid down in **Re City**

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25. *See Howard Smith Ltd –v- Ampol Petroleum Ltd. (1974) AC 821*

26. *CAMA Cap 120, LFN 2004*

27. ***In Adebayo –v- Shonowo -the Nigerian Supreme Court adopted the three broad principles of directors duty of care before the coming in to being of CAMA, 2004***

Equitable Fire Insurance Co. Ltd.[28] The lacuna here is that despite the provision of section 281, no limitation is put on the number of boards a person may serve on as a director at a time.

The combined effect of those provisions is that directors are required to possess the necessary and relevant skill and knowledge as required by them if they are to run the affairs of their company effectively. However, it is absolutely impossible for the directors to give out their time and attention to all the individual companies on which they are on their boards. In fact, the issue of time and attention in interlock and multiple situations is very fundamental in view of the undue burden of effective performance of the fiduciary duties of directors to be honest, impartial and the making of sound judgment and decision on directors. furthermore there is no statutory duty that makes attendance at board of directors meeting compulsory.[29]

The bottomline, generally of the forgoing discussion is on the issue of conflict of interest by directors. The requirement here is that, directors of companies shall

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28. *(1925) Ch. 407*

29. *American cases of Bowerman –v- Hammer, 250 US 504 (1919) and Kavanangh –v- gould, 223 NY 103, 119 NE 237 (1918).*

exercise their powers and discharge the duties of their office, honestly in good faith and in the best interest of the company. In so doing, they should not place themselves in a position of conflict between their duties to their company and their personal interests or duties to others. It follows that directors must have uncompromising loyalty to the companies on which they are on their boards, which loyalty he must demonstrate through his action in the exercise of his duties.

The duty to be loyal and exercise honesty and good faith are duties in the sense that they apply to every exercise of judgment, which a director undertakes. It expresses the law's view of how directors should discharge their duties and function on a day-to-day basis.

But in practical situation, will a director who is on the board of two or more companies be able to avoid conflict of interest and demonstrate absolute loyalty, honesty and good faith and independent judgment in situations where he is:

a) Subjected to conflicting duties;
b) In self dealing transaction where he is on both side of the business;
c) Where he is in possession of corporate information and opportunities relating to the corporate property and would not exploit them

for his own and to the exclusion of other companies

d) Where he should not have received benefit from third parties in exchange for the exercise of directorial powers.

The test of loyalty and good faith appears to be subject to directors' judgment and this, thus, makes the prove of proper exercise of duty a subjective test. The exception is where the directors have obligingly left a clear record of their thought process.

From case law, the only time a clear record of directors thought process was demonstrated was in the American case of **Dodge -V- Ford Motors**[30]. In that case, Henry Ford openly took the view that the shareholders had been more than amply rewarded on their investment in the company and so proposed to declare no further special dividends {of some 60% Per annum} in order to reduce the price of the cars; to expand production and to employ more skilled men, to spread the benefits of this industrial system to the greatest possible number and help to them build up their lives and their homes. This was held to be "an arbitrary refusal" to distribute funds that ought to have been distributed to the stakeholders as dividends.

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30. (1919) 17 NW 668.

What is being inferred here is that it is always difficult to show that a director has broken his fiduciary duty of loyalty and good faith, except in egregious case or cases where directors obligingly have left a clear record of mindset and direction. Thus, it is submitted that even though a director must not put himself in a situation where his fiduciary duties will conflict with his personal interest, but human nature being what they are, such conflict can never be avoided in a fiduciary situation. In interlock or multiple directorships such conflict will definitely have negative effect in corporate administration and management.

Another issue arising from loyalty and good faith is whether a director in a fiduciary can act independently. The duty to act independently relates to the director's duty

not to fetter the exercise of his discretion. The duty to exercise independent judgment does not prevent seeking advice especially from professionals, and experts for it might be a breach of duty of care if decisions are taking without appropriate professional expert advice.

5.9 Issue of Nominee Directors

Let's now relate the exercise of power and performance of this duty to act independently to directors function in corporate management. We have seen that the holding of

multiple directorship in more than two or more companies by a director may preclude the director from devoting full time and attention to the individual companies he is on their boards.

Supposing such director has delegated his function to a nominee, the issue is would the effect be different. It is submitted that the duty to act independently and in the best interest of the company does not prevent delegation of duties by a director. This supports the principle of appointment of nominee directors. The position of a nominee director in a fiduciary may pose some problems for the nominee because the issue of conflict of interest will definitely emerge. This is so because the nominee directors may not have been elected by shareholders, but by a particular class of security holders or creditors to protect their interest.

English Law had tried to solve the problem by allowing a nominee director to ignore the interest of his nominator when acting on the board of a company in which the nominator has interest.[31] The principle has been endorsed in the case of **Kuwait Asia Bank -V- National Mutal Nominees Ltd**[32] where it was stated that the principle has the advantage of not making the nominator liable for any

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31. *See statement of Lord Denning, M.R in Boulting –v- ACTAT (1963) 2 Q.B. 606 The issue was considered at P. 626 of the report.*
32. *(1991) 1 AC 187 (PC)*

breach of duty to the company by the nominee director.

Though beautiful as the English Legal position is, the issue is whether in practice, the principle can be obeyed. The answer must be in the negative. Here again lies the danger inherent in the practice of multiple directorships.

In the US, the principle is "dance with the one who brought you or else" as illustrated in a story by an investor in a prominent electronic company. As the story goes, the head of the board of director's compensation committee was the chancellor of a college. The president of the company in turn was the chairman of the college board of trustees. In situation like this it is absolutely difficult for the director to challenge his boss whose interest he represents. In a sense, the director is not picked to challenge the management.[33]

The difficulty of a nominee director was highlighted by the House of Lords in the case of **Scottish cooperative wholesale society -V- Meyer.**[34] by Viscount Simons and Lord Denning M.R. Viscount Simons in his own judgment said as follows:

> "The three nominee directors were aware of the policy of the society. It is undeniable that persons so

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33. *See Donald H. Jr. & Gillat, S. "Corporate Governance at the Crossroads" (Migraw Hill, Irwin 2005) P. 153*
34. *(1958) 3 WLR 404*

placed may find themselves in a difficulty. But in all the evidence, I have not been able to find the least trace that they regarded themselves as owing any duty to the company of which they were directors. They were the nominees of the society and if the society doomed the company to destruction, it was not for them to put out a saving hand. Rather, they were to join at the work, and when a frank and prompt statement to their co-directors might have enabled them to retrieve its fortunes, they play their part by maintaining silence" [35]

In that case also, Lord Keith, referring to the way in which the directors further the policy of the society in its design to "kill" the company said as follows:

"On the vital matters affecting the company's prosperity known to the nominee directors, these directors, remained silent, concealed the facts from the petitioners and took no action and gave no advice helpful to the company; their conduct as directors was a negative one to let the company drift towards themselves".[36]

Lord Denning in his lengthy judgment puts the position of the nominee directors clearer when he said as follows:

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35. Ibid) P. 410
36. Ibid P. 421

"So long as the interest of all concerned where in harmony there was no difficulty. The nominee directors would do their duty by both companies without embarrassment. But as soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position..... It is plain that, in the circumstance these three gentlemen {the three nominee directors} could not do their duty by both companies and they did not do so".[37]

Thus, in a fiduciary, it is practical that there is little doubt that even if the nominee directors could do anything, to question the policy of their nominator, the risk of such action to their position would have been a very strong deterrent. Subordination of the interest of their nominating company to those of the second company which they are on its board by nomination would definitely make them to face the risk of losing their seats on the nominator company.

It is therefore, not surprising that under English Law, all attempts in various judgments in the House of Lords focusing attention on the very difficult position of nominee directors has failed to offer any solution to the problem

37. *Ibid P. 421-432*

posed by the law as it now stands. On this issue, it is submitted that in a fiduciary, a director who doubles as a director on the board of a company and a nominee director representing the interest of his company on the board of another company in which his company has interest will definitely play the principle of "dance with the one who brought you or else"[38]

5.10 Position Of Managing / Executives Directors

Before concluding this chapter, it is important to look at the position of directors employed in their professional capacities. The managing and executive directors of companies' fall under this category, because they must have been engaged as professionals with contract terms. In their own case, a very high degree and standard of competence, care, skill and attention is required from them. By the provision of Section 281, which allows multiple directorships they cannot be barred from being a director of other companies. The only exception is where their contract of service disallows them from holding directorate in other companies.

Absence from their seat in the company on which they serve in executive capacity will create a vacuum. Thus, they may not be able to discharge their duties

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38. ***Donald H.C. Jr. & Gillat, S. (supra).***

effectively and efficiently to the companies on which they are on their boards. This will definitely impact negatively on the management of the affairs of those companies.

5.11 Abuse of Insider Information

A discussion on the consequential effect of interlocking directorate and multiple directorships may not be complete without discussing the serious danger of conflict of interest arising from the use of insider information and knowledge.

Professor William Cary,[39] former chairman of United States of America's Securities and Exchange Commission (US SEC) said of insider abuse as follows: -

> "The use of insider by director or other manager to trade in shares is the securing of additional compensation in a convert fashion and should be condemned.[40]

By virtue of the nature of directors work, the directors normally receive information on their companies which are not available to others.

After Jerkin's Report,[41] Companies Act devoted a whole chapter to making provisions on insider practice. The

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39 See Cary, W. " Corporate Standards and Legal Rules (1962) 50 Cal. L R 408 P. 15

40. Ibid P. 415

41. Jerkin's Report- Supra S. 615 (1), (2), (3)

relevant issue to deal with here is as it relates to the fiduciary duty of directors in interlock situation. Section 615[42] of the Act makes elaborate provision prohibiting insider dealing in securities. It also prohibit dealings in shares in any other company where the insider has obtained price sensitive information relating to transactions with that other company by virtue of his connection with the first one.

With due respect, the issue of insider abuse goes beyond dealings in company securities The categories of the information include any confidential information, which, they may acquire in the course of their employment with their company, such as confidential processes, trade secrets, list of customers or method of business etc which any company would like to keep as its exclusive property which if not protected, will prejudice the prospect of such companies.

The obligation of directors in respect of trade secret and confidential information are not exclusively dependent on the terms of the employee's contract of employment. Where no contract of service exists between a director and his company, he will still be under same form of obligation in the course of his employment.

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42. CAMA Cap 120, LFN 2004 (formerly CAMA 1990)

The obligation is fiduciary and arises out of the confidence reposed in the director by the company. The danger here is that interlocking directorate and multiple directorships could lead to flagrant betrayal of the directors fiduciary duties by directors of companies and corporation who may use the dual appointment and position of trust and confidential information coming to their knowledge to exercise sufficient control and acquire and make profit, to the detriment of others who may not be in possession of such information. In essence, it inevitably creates conflict of interest as the board with insider information could use it for instance to delay or reject a take over bid or have undue advantage of insider share transaction. [43]

While it may generally be agreed that the complexity of modern corporate business demands that every effort be made to utilize the skill and ability of those who have intimate and expert knowledge of matters relating to companies, the presence of such people as directors on the board of several companies, may make it very possible that the director may subordinate the interest of one company to those of the other. This is because it is doubtful whether the director could discharge equal loyalty to both or all the companies, he is a director at the same time.

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43. See Industrial Development Consultants –V- Cooley {supra}; Canadian Aero Service –V-O' Malley {supra}.See also S. 615, 616, of CAMA, Cap 120, LFN 2004.

In view of the seeming danger, Prof. Olawoyin[44] submitted that the principle of multiple directorship or interlocking directorate should not be extended to situation where the business of the companies concerned is highly competitive. As already pointed out, it has been submitted that if the business of two or more companies are highly competitive, acceptance of a director of one of the companies should disqualify the director from being on the board of the others.

The rationale here is that by the very nature of directors' position, they have easy access to the trade secrets of their company, while much confidential information is passed on to them in the course of their duties. The amount and nature of the information or trade secret passed vary from company to company and from one director to another. In situation such as this it is not practically possible for a person holding directorship in two or more companies to avoid conflict of interest and the use of insider knowledge and information to the detriment of some of the companies on which he is on their boards.

Section 617 of the Act[45] which has outlined actions not prohibited by section 615 &616 of the Act[46] seems to

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44. Olawoyin, G. A. Op. Cit P. 17

45. CAMA Ibid.Note that the defence provided under this section of CAMA has been abolished in England under the criminal justice Act, 1993

46. CAMA Ibid

cushion the fraudulent directors who may use information acquired to their advantage and to the detriment of others. The summary of the provisions are that:

1. There is no liability unless action of the director is with a view to making personal profit and avoiding loss.

   Exemption of liquidation receivers and trustees in bankruptcy where the director enters the transaction in good faith in the course of performance of his function.

2 No prohibition if the directors action will be to facilitate the completion or carrying out of a transaction.

For whatever reason these exceptions were provided, it is hereby submitted that a director in a fiduciary who holds multiple directorship or in interlocking directorates can always make use of these provisions as a defense to the detriment of others and the company.

Thus, the real danger insider of knowledge creates the potential conflict of interest because there are no adequate penal and liability provisions in our laws to make a director holding multiple appointments or a director in interlock that may use his position to breach his fiduciary duties culpable.

Two fiduciary duties created in the Act[47] which attract, liability are: -

1. Use of directors powers for proper purpose[48]
2. Must not take secret benefits and profits from the company[49]

Section 620 of the Act limits the action to a period of 2 years. This means that after the period, a victim who suffers damages, loss or injury lacks judicial remedy albeit all remedies. The provisions of section 617 of the Act, creates a possible situation for directors to escape liability and culpability. The no liability clauses unless the director's act is with a view to making profit or avoid loss(whether to himself or someone else) if the motive is not to generate financial benefit to the company, has watered down the prohibition of secret benefit/profits and loss avoidable rules.[50] Even then the prohibition is difficult since the motive of every director will be to make profit and avoid loss.

5.12 Corporate Failure and Collapse

One issue that has not been addressed and our lawmakers did not in fact advert their mind to was the consequential

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47. Sec 620, CAMA,

48. See Rielled Steel Product (Holdings) Ltd Ltd –V- British Steel Corporation and others-unreported British Companies case No. 2/12/81 in (1982) 3 Company Lawyer 23 - 125.

49. See Industrial Development Consultants –v- Colley (1972) 2 Aller 162; (1972) 1 WLR 443

50. See s. 617 (1)(a) and (2)(c)

effect of multiple directorship or interlocking directorates leading to collapse of ersthwile booming and productive companies and corporations.

The combined effect of conflict, poor supervision, poor administration, lack of time and continuous attention have equally given rise to the phenomenon of corporate collapse being witnessed today.[51]

For instance, practical example was the financial stagnation witnessed in AP. Plc,[52] ENPEE Industries Plc[53] and the problem affecting **Golden Guinea Breweries Plc,**[54] located in the Eastern Nigeria which were all as a result of conflicting interests displayed by interlocking and multiple directorships. In the later case, the matter arose from the refusal of the Board of directors of Golden Guinea Breweries Plc to recognize and give validity to

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51. *See Akume, A. A. "Predicting Corporate Collapse in Nigeria", Modus International: Law & Business Quarterly, Vol. 4. No. 2 (1999) P. 45.*

52. *AP Plc, a director of NNPC was a director of AP Plc and there was the assumption of NNPC's overseer role which gave way to conflicting records of oil lifted and cost and the effect on AP. This account for the problem, of AP Plc till date.*

53. *The Chairman of NAMBL was the chairman of ENPEE industrial Plc. Conflict of interest was displayed in favour of NAMBL (a bank) at the expense of ENPEE when in fact,. NAMBL was in violation. See ENPEE Industries Plc –v- Nigeria American Merchant Bank Ltd, case No. SEC/APC/13/2001 reported in SEC APC record of proceedings. (200-2002) P. 30; Suit No. FHC/L/CS/317/2001 &FHC/CS/436/2002-NAMBL –V-ENPEE Industries Plc & others brought by NAMBL which was however withdrawn in an out of court settlement by the SEC.*

54. *See Nsofor & Anor –v- Golden Guinea Breweries Plc, Suit No. FHC/UM/CS/236/2001 instituted by the plaintiff directors to frustrate the directive of Securities and Exchange Commission (SEC) and Suit No. FHC/ABJ/110/2002 instituted by SEC to enforce its directive against the Brewery Company. Both cases were still pending in the courts as at the time of writing this project.*

share transaction by a foreign investor through the debt conversion programme of the Federal Government of Nigeria. The payment for the shares was through the Central Bank of Nigeria (CBN) and the Central Bank acknowledged the payment within the period specified. A director of IMB Plc who also held directorship in the Brewery Company used position IMB Registrars, from carrying out the order of SEC that the Registrar should enter the name of the foreign investor in the register of members. Thus, if the concept of corporate collapse is considered a serious danger to the life of a company, then the practice of multiple directorship or interlocking directorate is possibly an important factor. This is because it embodies all the components in the administration and collapse of companies and corporations.

The issue of time management and giving real attention to the affairs of the company required in the discharge of directors duties; poor management which place of undue burden on the effective performance of fiduciary duties of directors; duties such as duty to be impartial, duty to bring good judgment and honesty in transactions involving the company as well as avoidance of conflict of interest and insider abuse will all lead to collapse and demise of corporations and companies.

5.13 Judicial Attitude

The Approach and attitude of the court to the various aspects of fiduciary duties of directors are influenced largely by principles relating to director as trustee. Judges have tried to draw analogy between directors on one hand and trustee on the other as well as other fiduciaries.

However, if the courts are not to interfere with the holding of multiple directorship and interlocking directorate, there should be no manifestation of unfairness, abuse of discretion, lack of good faith, conflict of interest, lack of transparency and lack of good corporate governance. The courts have approaches and tests to determine where there has been a breach of any of the directors' fiduciary duties. As has been discussed earlier in this work, in some cases the test applied is objective while in others it is subjective, all depending on the facts and circumstances surrounding each case.

In any event, there should be no evidence of breach of any of the directors' fiduciary duties of care and skill and duty to avoid conflict of interests in all situation or else the courts will certainly beam its searchlight on the institution of interlocking directorates to pave way for a transparent and accountable corporate management and administration. The essence, Professor Gower, puts it, is

that it is certainly not enough for the directors to escape liability that he acted in good faith or had honestly formed the view that the company's interests were not capable of being harmed by what was done, for the question of whether an actual potential conflict of interest has arisen is one for the courts.[55]

Though, at common law, the only reason to unlock the interlock is the breach of fiduciary duties of directors, the law does not make any attempt to introduce distinctions between the kind of companies in which a person could act as director so that the competitive nature of the business of two or more companies would not preclude a director from seating on the board of several or even all companies. Thus, in the celebrated case of **London and Mashonaland Exploration Co. Ltd -V- New Mashonaland Exploration Co. Ltd.**[56] Where Lord Mayo intended to be both Chairman of the Plaintiff Company and a director of the defendant company, the court: held that the director is not so prohibited. In that case, Chitty, J. observed as follows: -

> ".....assuming that Lord Mayo had been duly selected Chairman and director of the Plaintiff company, there was nothing in the articles which required him to give any part of his time much less

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55. Gower Op. Cit P. 559

56. (1819) WN. 165,

the whole of his time from acting as a director of another company, neither was there any contract express or implied to give his personal services to the plaintiff company or to another company. No case had been made out that Lord Mayo was about to disclose to the defendant company any information that he had obtained confidentially in his character of Chairman.... no case has been made for an injunction."[57]

This dicta was approved by Lord Blanesburgh in the case of **Bell –V- Lever Brothers Ltd.**[58] It is thus, the opinion of his Lordship that Mashoalands case was the authority for the principle that if the constitution of the company did not state that a director's services must be rendered to that company alone, and there was no disclosure of confidential information, a director could not be restrained from holding a directorship in a rival and competing company.

The above position of the Company Law notwithstanding. If a director is required by his company's articles to devote his whole time and attention to the business of his company, or he is by contract prohibited from acting as a director to another company, he maybe justifiably be

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57. Ibid at P. 195, See also Skinner, Op Cit P. 12

58. (1932) AC 161

restrained from doing so. The wisdom in this kind of prohibition is definitely to prevent the disclosure of information which the director obtained confidentially as a director of the first company to the subsequent or second company.

Hence Lord Denning wasted no time in pointing out in the **Scottish Co-operative Wholesale Society -V- Meyers**[59] that a director holding multiple directorships who subordinates the interest of one company to the other risks an application for relief on the ground that the affairs of the companies are being or have been conducted in a manner which is unfairly prejudicial to the interest of some part of the members including the applicant.[60]

The decisions in the cases of **Mashonaland** and **Bell** are in contrast to the decision of the common law Court in the earlier case of Aberdeen **Railway Co. –V- Blaikie Brothers**[61]. In that case, Lord Cranworth L. C. in expatiating on the fiduciary nature of the duties of agents stated thus:

> "So strictly is this principle adhered to that no question is allowed to be raised as to the fairness of a

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59 (1959) AC. 324; (1958) 3 All E.R. P. 66; (1958) 3 W. L. R. 404

60. See also the Provision of Section 310 of CAMA, 2004

61. (1854) 1. Mag. {H.L.} 461.

contract so entered into... It may sometimes happen as could have been obtained from any person, they that the terms on which a trustee have been so good may at the time have been better. But still so inflexible is the rule that no inquiry on the subject is permitted."[62]

Thus, as an inexorable rule of equity, a fiduciary must not place himself in a position of conflict with the interests of the beneficiary. The fiduciary must not enter into situations of possible conflict irrespective of the fact that such circumstances result in no loss or even gain to company.

Clearly, therefore the principle established in the cases of **Mashonland** and **Bell** are in conflict with the rule in Aberdeen Railway's case which appear to be so inflexible and permits no inquiry on the subject.[63] To create a distinction, Lord Blanesburgh has in **Bell's case** concluded that the principle in **Aberdeen Railway's case** only apply to company contracts in which a director has interest and not to contract which the director has with outsiders. No

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62. *Ibid at P 471-472*

63. ***See also Boardman-V- Phillps (1967) 2 AC Las. 461 North West Transportation Co. Ltd, -V- Beatty (1887) 12 App. Cas 589; Transvaal Lands Co. –V- Belgium {Transvaal Land Department Co.} (1914} 2 Ch. 488.***

matter how it is looked at, it is humbly submitted that a director is a fiduciary and must always be treated as such.[64]

The submission is re-enforced by the decision in **Fullwood -V- Harvey**[65] where it was held that an agent who has accepted an employment from one principal cannot in law carry on business which is similar to that of his company, nor should he work for his company's competitor or accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each of the principals of his interest and obtains the consent of each principal to the multiple appointments.

Similarly, in **Re Thomson**[66] where the relationship was that of a trustee, the Court construed and applied the dicta of Lord Cranworth in **Aberdeen Railway's Case**[67] to restrain a trustee in his personal capacity from engaging in a business that was in competition to that of his beneficiary. It is again respectfully submitted that this principle can be applied to the duty of employees to their

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64. *See Imperial Mercantile Credit Assoc-V- Coleman & Knight (1873) 6 Ch 578. See also Sasebgon: Nig. Company & Allied Matters Law (supra) P. 429*
65. *(1928) 1 K.B. 498.*
66. *(1921) 1 Ch. 203*
67. *(1854) 1 Macq. (H. L) 461*

employers especially the relationship between Managing Director/Executive Directors and the company they manage, which is in a sense, that of employer and a servant.[68]

The nature of work of Executive Directors demands that they devote their full time and attention to the services of their corporation. Consequently, they are expected like every other servant of the company to refrain from engaging in a business which is similar to that of his company, nor should he work for his company's competitor [69].

Professor Gower, after reviewing the case of **Hivac Ltd**[70] which was the authority that the duty of fidelity flowing from the relationship of master and servant may prohibit the servant from engaging even in his spare time, in a work which competes with his employer, submitted that the position of directors of companies requires a reconsideration such that it applies to any director[71]. With due respect, it is submitted here that acceptance of such view will make nonsense of the concept of multiple

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68. *See Hivac Ltd –V- Park Royal Scientific Instrument Ltd. (1946) 1 All ER. 350. See also Sanders-V- Parry (1967) 1 WLR 753*
69. *See generally Freud, O. K. "Separate Times Activities of Employee (1946) 9 MLR 145; A Lewis, "Separate Times Activities of Employees: An Economic Comment" (1946) 9 MLR 280.*
70. *(1956) All E.R. 350 (1946) Ch. 169.*
71. *Gower L. C Op Cit; 548*

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directorships especially as there is the possibility that companies that desire to benefit from the experience and expertise of certain directors or individuals who posses considerable business experience and skill may not be able to have such benefit.

The courts in other Common Law Jurisdictions, have displayed discomfort and mental gymnastics in applying the anomalous principle in **London and Mashonlands Exploration Company Ltd's case**[72]. The effect is that as with other fiduciaries, the director can be absolved from liability for breach of duty if the company consents to or ratifies the otherwise prohibited act or omission or if the transaction was fair and beneficial to the company. It is submitted that the transaction in this case will not be avoided simply and solely because of the director's conflict of interests.

It is to be noted that the subject matter here is "fairness" as the court may refuse to uphold a transaction for reason that it was unfair. For instance, the court refused to uphold a self-dealing transaction in the case of **Flieger -V- Lawrence**[73] notwithstanding the fact that there was a full

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72 *See Skinner D. Op at 16: See South African case of Atlas Organic Fertilizer (PTY) Ltd –V- Pikkenwyn Ghwano (PTY), Ltd, (1981) 25. . 123 198 (T. P. Dist); Abbey Glen Property Corp –v- Stumborg 65 DLR 3D (1976) 325 (Canada).*

73. *361, A 2D 218 (Del 1976)*

disclosure and ratification by the disinterested majority for being unfair.

In the United States of America, the two principal legal instruments that have been used to address the consequences of interlocking directorate are the Sherman Act[74] and the Clayton Act[75].

Section 1 and 3 of the Sherman Act are targeted at contracts, combinations or conspiracies in restraint of trade, while Section 2 attack monopolies.

The spirit of the Act reflects the Common Law positions that contract in restraint of trade are generally void. The voiding of this category of contracts was not because the concept of multiple directorships need not be an evil, and may indeed benefit companies formed in groups, but because it's by-products or interlocking directorates could easily cause serious problems in relation to intercorporate contracts. This was evident in the case of **Regal {Hasting} Ltd -V- Gulliver**[76] which is a telling example of abuse of combination of two concepts being considered within the same group of companies.

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74. ***Codified as amended in 15 U.S.C Sections 1, 2, 3, (West Supp. 1993)***

75. ***Codified as amended in 15 U.S.C Section 12 -22, Also 27 and 29 U.S.C Section 52-53 (West Supp. 1993).***

76. ***(1942) 1 All E. R 378***

The abuse comprises the manner in which the board of Regal, which was also substantially the board of its subsidiary, purported to hold the board meetings of the two companies simultaneously[77].

It is no wonder therefore, that the concept of interlocking directorates has received scathing condemnation from Loius Brandeis[78] who in a series of articles exposed the rapid growth of interlocking relations among competing industrial companies and financial institutions. Brandeis in his condemnation of interlocking directorates state as follows:

> "The practice of interlocking directorates is the root of many evils. It offends laws, human and divine. Applied to a rival corporation, it tends to the suppression of competition.... Applied to corporations which deal with each others, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters."[79]

Because of the perceived evil effect of interlock, it would appear that President Wilson had in his 1912 election, campaign against those "trust" and asked congress to ban

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77. ***See also the case of Scottish Corporation Wholesale Society –v- Meyer (1958) (supra).***
78. ***Brandeis, L. D. "Other Peoples' Money" {1933 Ed.}***
79. ***Brandeirs, L. D. Op. Cit P. 35***

the practice of interlocking directorate even before Brandeis condemnation.

Congress responded by enacting Section 8 of the Clayton Act which has since then been the primary enforcement tool against anti-competitive collusion resulting from interlocking directorates[80].

The law while largely unchanged since 1914 has been updated in 1990 to plug some loopholes in the regulation of direct interlock[81].

Similarly, in United States jurisdiction, it has been customary to include waiver clauses in the charter or by-laws of corporation stating that contracts involving direct or indirect interest will not be invalidated because such interest or the interested directors' presence was needed for a quorum or a majority vote. Such provision may have the effect of shifting burden of proof of fairness from the director to those who will be against the business transaction. However, going by the decision of the court in the case of **Irwin -V- West End Development Company**[82] the clauses will not absolve a director from

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80. See Kinter, S. Federal Anti-Trust Law, {1984} 424

81 See generally Miller, G. T. "Interlocking Directorate and Anti-Trust Laws" Colorado Lawyer, March, 1997. See also Bank of America Corp. –V- United States, 462 US 122, {1983} 126 -127.

82. 481, F 2ND 34{10TH Cor. 1973} {US}.

breach of duty of good faith in dealings in company affairs.

The position under English Law seems not different in view of the provisions of Article 85 of Table A and Section 310 of English Companies Act, 1985. Also two statutory enactment,[83] have made provisions for monopolistic situations, mergers, restrictive trade practices, resale price maintenance and other forms of anti-competitive activities.

In Nigeria, the principle enunciated in **London and Mashonland Exploration Company Ltd's case**[84], is no longer good law in view of the provisions of section 279 and 281 of our Companies and Allied Matter Act, 2004. The provision of the law is so strong that no provision, whether contained in the articles or resolution of a company, or in any contract shall relieve any director from the duty to act in accordance with this section or relieve him from any liability incurred as a result of any breach of the duties conferred under section 279 of the Act[85]. In other words, the director cannot plead the fact that the situation arose because of his multiple directorship on the board of several companies.

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83. See Fair Trading Act, 1973 (US) and Competition Act, 1998 (US).
84. (1819) WN 165
85. See CAMA. S. 279 (8)

Similarly, the contract of the directors employment could contain specific provisions prohibiting competition with the company. However, it seems likely that such specific provision will be observed more in the event of a breach.[86] Under Nigeria Labour Law, utmost fidelity is required of a servant such that he may be prohibited from working for a company that competed with his own company even at his spare time as in **Hivac Ltd's case.**[87]

Nigeria do not have equivalent of the US Sherman and Clayton Acts, except the Federal Competition Bill being sponsored by Bureau for Public Enterprise. The bill seeks to prohibit contracts, arrangements and restrictive practices, which are deemed to be in restraint of trade. It is believe that when the law is in place, the effect of interlocking directorate in corporate governance may likely be minimized.

5.14 Conclusion

Though the Nigerian Company Law allows interlocking directorate and multiple directorships, the question is whether in a situation of this nature, the director can discharge the fiduciary duties of loyalty, good faith,

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86. ***Thomas Marshal {Exporter s} –V- Guinle {1978} 2 W. L.R. 116***
87. ***See Hivac Ltd –V- Royal Scientific Instrument Ltd, {1946} Ch. 169 & Andreas Koumonlis –V- Leventis Motors Ltd.{1973} 1, NMLR 452.***

honesty and the duties of care, skill and knowledge simultaneously to the many companies he is on their boards. The truth is that there is a very strong possibility that he may be moved by human consideration to subordinate the interest of one company to those of others. The directors' interest in each of the companies is most likely to influence his attitude, such that one will benefit and profit more at the expense of others.

CHAPTER SIX

SUMMARY, RECOMMENDATIONS AND CONCLUSION

6.1 Summary

The issue as to whether a director in fact should be regarded as a trustee or agent is now a moot point and one of academic exercise. The relevant point to consider is whether a director who stands in a fiduciary relationship with the companies on which they are on their boards would act at all times with good faith and intention, honesty and prudence in the interest of the company.

For one, there is nothing in the Companies Act[1] that limits the number of directorship a single person can hold. The major exception is a situation where parties have entered into agreement to the contrary, so that nothing prevents the director of a company from accepting other directorships. This position seems sustainable, even though some companies may be engaged in a form of business that is very similar to others.

The problems that are associated with multiple directorship and interlocking directorates have brought paradigm shift from mere corporate management and control to effective and efficient corporate governance and the consequent effect of interlock or multiple appointments on it.

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1. *CAMA, Ibid*

6.2 Findings

It has been generally accepted that the recognition of the concept of interlocking directorates and multiple directorship arises out of the need to enable people who have acquired experience and skill in management to make their assets available to more than one company.[2] That is to say that the major advantage flowing from the practice of multiple directorship and interlocking directorate is in the area of free flow of entrepreneurial talent without which modern business is likely to suffer. Hence the retention of the practice is hardly overlooked.

In fact, under the Nigerian Company Legislation, the most salutary innovation is the incorporation of the all important principles of English Common Law which have to do with the fiduciary duties of directors into the body of our Companies Act,[3] as opposed to the provision of 1968 companies act. It has stated in clear terms that a director stands in fiduciary relationship towards the company and must always act with or for the company in strict observance of the utmost good faith doctrine.

The principle was recognized in the case of **Okeowo-V-Migliore**[4] where Eso JSC said as follows: -

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2. *See Olawoyin, G. A. "Status and Duties of Company Directors" P. 166*
3. *CAMA, Ibid.*
4. *(1979) 12 NSCC 210*

> "It is the duty of the director of a company to exercise power vested in them for the benefit of the company, their fiduciary relationship is not for individual advantage but for the company"[5]

His duties should not conflict with his interest and if he undertakes to act for another, he shall not do so for himself.[6]

However, the acceptance and recognition of the practice of interlocking directorates/multiple directorships makes the practical operation of some of the rules relating to the fiduciary duties of directors very difficult, if not unrealistic.

The concept is seen as being inconsistent with the application of the fiduciary duties of loyalty and good faith of directors to their companies as well as various possibilities of grave abuses in the system.

Thus, multiple directorship and interlocking directorate could be seen to have contributed largely to the malaise of many companies due to poor performance of their board and most cases of collapse of several corporate entities. It, in fact seems to place undue burden on the effective

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5. *Ibid, P. 263*
6. ***Adedire V- Ife Divisional Council (1963) 1 All NR 3***

performance of the fiduciary duties of directors to be impartial and to bring sound judgment and honesty to bear on their transactions with the companies.

5.3 Recommendation

The views expressed in this research notwithstanding and having regards to the provision of section 281,[7] unless there is an agreement to the contrary, seemingly nothing prevents a director from placing his added experience and general skill acquired in the course of his employment in his company at the service of the other, provided that it does not include trade secrets and confidential information relating to it.

Thus, it is submitted that the statutory innovation of section 281 is that a director is still subject to the normal equitable principle not to make use of the property, opportunity and information available to him in the course of his stewardship in one company for the benefit of another or himself. For this reason and the fact that section 279{3}[8] confers on a director immense discretion in the exercise of their powers, the concepts must always come under the scrutiny of the courts to prevent its abuse and consequent negative effect on corporate governance.

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7. *See CAMA, Ibid*
8. *See CAMA, Ibid*

The danger is the judicial attitudes that a decision of the directors will not be tampered with so long as the makers act with loyalty and good faith and the purpose is neither improper nor was there insider abuse and conflict of duties and interest.

For a director to demonstrate unavowed loyalty, he must display an uncompromising loyalty to the organization through his actions. A director sitting on the board of two or more different companies having conflicting interest should be required to resign from the board of one of the companies because there is no way he could demonstrate loyalty to both companies by his actions.

On the other hand, it is suggested that our company legislation be reviewed and adequate provisions be incorporated to bring the law in tune with modern experiences in company management and administration.

The English company Lawshas undergone series of review with the latest in 2008.[9]

For instance, the current English Companies Act,[10] lay

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9. ***The current company in UK is the "English Companies Act, 2006; see also See Davis, P. L.: "Gower and Davies principles of modern company law (8th Ed.) 2008, chap. 16 P. 475 -604 which has also been updated.***

10. ***English Companies Act, 2006***

emphasizes on the duty of directors to promote the success of the company as the modern version of directors basic duty.

Sections 172 of the Act, speaking in relation to the fiduciary duties of directors require directors to "act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefits of its members as a whole". The section specified matter which the director must give regard when deciding on the appropriate course of action.[11] This is a step ahead of the old common law duty typically formulated as one requiring the director "to act in good faith" in the way he believe to be "in the best interest of the company".[12]

The new formulation was as a result of the insufficiency of the old common law duty to precisely guide the directors about whose interest should be promoted in the exercise of their discretion. The formulation shows that the beneficiary of the directors efforts to promote the success of the company are clearly the members of the company who are its, shareholders.

It has been submitted that the underlying trust of the section is that it is the members who are to define the

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11. *Davies; P. L. "Gower & Davis principles of Modern Company Law (8th E.d) supra*
12. *Per Romer, J in Re City Equitable Fire Insurance Company (1925) supra*

purpose of the company against which the directors can give meaning to the requirement to promote its success.[13]

In Nigeria, the principle operational which is based on Romer, J's formulation in Re City Equitable Fire Insurance Co. Ltd case[14] is that the "directors of companies shall exercise their powers and discharge the duties of his office honestly in good faith and in the best interest of the company and shall exercise that degree of care, diligence and skill which a reasonable prudent director would exercise in comparable circumstance.

It is therefore suggested and submitted that section 281 and indeed all other provisions be reviewed to bring Companies and Allied Matters Act, 2004 on board with global reforms going on in company Laws worldwide. It is also further suggested that the Central Bank of Nigeria (CBN), Securities and Exchange Commission (SEC) and the Corporate Affair Commission (CAC) should further undertake a review of their codes of corporate governance with a view to addressing the vacuum created for non-provision of rules to regulate interlocks and multiple directorships under the Nigerian Company Law.

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13. ***Davies, P. L. "Gower & Davis Principles of Modern Company Law (8th E.d) (supra) 14.***
14. ***Per Romer, J in Re City Equitable Fire Insurance Company (1925) supra***

6.4 Conclusion

A genuine reform of the Nigerian Company Laws and regulatory rules by the legislative authority and government regulatory institutions is therefore necessary to eliminate the inherent danger of flagrant betrayal of the directors' fiduciary duties by directors who may use their dual appointments and positions of trust and confidential information coming to them to exercise sufficient control and acquire and derive more benefits to the detriment of others who may not have such opportunity and advantage. The endemic phenomenon of corporate failures and collapses, now a future and by-product of negative consequences of interlocking and multiple directorships with its attendant economic crisis and social problems could, thus, be addressed to move the country's corporate sector forward.

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