

**A CRITIQUE OF THE SEPARATION OF OWNERSHIP AND CONTROL OF
COMPANIES UNDER COMPANIES AND ALLIED MATTERS ACT 2004**

BY

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LLM/LAW/0322/2009-2010**

**DEPARTMENT OF COMMERCIAL LAW
AHMADU BELLO UNIVERSITY,
ZARIA, NIGERIA**

MARCH, 2016

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**BEING A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE
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**DEPARTMENT OF COMMERCIAL LAW
FACULTY OF LAW
AHMADU BELLO UNIVERSITY,
ZARIA, NIGERIA**

MARCH, 2016

DECLARATION

I declare that this Dissertation entitled “A Critique of the Separation of Ownership and Control Under Companies and Allied Matters Act 2004” is entirely the product of my own intellectual efforts conducted in the Department of Commercial Law, Ahmadu Bello University, Zaria-Nigeria. I am not aware of any similar work published or presented elsewhere, at any time, by anybody, institution or organization, for the award of any degree. The information derived from other literary works have been duly acknowledged in the text and a list of references provided. However, I am personally responsible for the views expressed and any defect that may contain herein.

Jairus Ede OTOJA
LLM/LAW/0322/2009-2010

Signature

Date

CERTIFICATION

This Dissertation entitled “A Critique of the Separation of Ownership and Control Under Companies and Allied Matters Act 2004” by *JAIRUS EDE OTOJA* meets the regulations governing the award of degree of Master of Laws (LL.M) of the Ahmadu Bello University, Zaria-Nigeria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This Dissertation is dedicated to God Almighty whose guidance has seen me through every phase of my life.

AND

Everyone who has struggled to pursue a dream. Keep believing. Faith and perseverance do pay off.

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It is to the people who have helped and advised me that the credit for what is accurate in this work belongs. The mistakes are mine. I am, of course, solely responsible for the contents of this dissertation and for any and all misuses which I might have made of the suggestions received from them, and others I have inadvertently failed to mention.

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ABBREVIATIONS

ALL ER	All England Reports
ALL NLR	All Nigeria Law Reports
C.A	Court of Appeal
CAC	Corporate Affairs Commission
CAMA	Companies and Allied Matters Act
Cap	Chapter
CBN	Central Bank of Nigeria
CCHCJ	Certified Cyclostyled High Court Judgment (Lagos)
CEO	Chief Executive Officer
CH	Chancery
Ch.D	Chancery Division
EGM	Extra-Ordinary General Meeting
Harv. L.R.	Harvard Law Review
Ibid	Ibidem
ISA	Investment and Securities Act
JCA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court of Nigeria
KB	Kings Bench
LFN	Laws of the Federation of Nigeria
LRN	Law Reports of Nigeria
MD	Managing Director
MR	Master of the Rolls
NCLR	Nigerian Commercial Law Reports
NLR	Nigerian Law Reports
NMLR	Nigerian Monthly Law Reports
NWLR	Nigerian Weekly Law Reports
Op. cit	Opere citato
Pt	Part
QB	Queens Bench
S.	Section
SC	Supreme Court of Nigeria
SCNJ	Supreme Court of Nigeria Judgments
SCNLR	Supreme Court of Nigeria Law Reports
SEC	Securities and Exchange Commission
Ss.	Sections
Vol.	Volume
WACA	West African Court of Appeal Law Reports
WRN	Weekly Law Reports of Nigeria

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ABSTRACT

Undoubtedly, the corporation has become one of the most powerful forces in twentieth century economies. It is both a method of property tenure and a means of organizing economic life. The corporation's separation of ownership into component parts, control and beneficial ownership has brought into sharp focus the fundamental divergence between shareholder and management interests. With sole proprietorships, the owners are usually the same people who manage and operate the business. But in large companies, corporate officers manage the business on behalf of the owners. This separation of ownership and control creates a potential conflict of interests. In particular, managers may care about their salaries, fringe benefits, or the size of their offices and support staff; or perhaps even the overall size of the business they are running, more than they care about the shareholders' profits. This agency problem caused by the separation of ownership and control has long been a great concern globally. This is particularly so in the wake of mass corporate scandals witnessed in the past couple of years. Just like any other country, Nigeria has faced the same problem. In Nigeria, the Companies and Allied Matters Act, Cap. C20, LFN, 2004, was enacted as the principal statute regulating the formation and management of companies. The central tenets of the Act have been accountability, efficiency and objectivity on the part of management. However, cracks are visible in many areas of the Act with gross attendant consequences for directors. It is found out that the exercise of the powers as conferred by the Act on the directors to direct and manage the business of the company is vulnerable to abuse. This is particularly the case when directors are partially permitted to deal in contracts with their own companies. There is therefore the need for amendment of the Act. This study examines the relevant provisions of the Companies and Allied Matters Act, 2004 as well as the two Codes of Corporate Governance for public companies in Nigeria using doctrinal method. The objective is to ensure that there is corporate accountability.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND TO THE STUDY

A company once incorporated is a legal person; distinct and separate from the members that established it¹and is also endowed with all the powers of a natural person of full capacity for the furtherance of its authorised business or objects specifically set out in its Memorandum of Association.² The Company being an artificial person – in contradistinction to a natural human being, therefore, can only function or operate through the instrumentality of its human organs, officers and agents.³ This view was observed and more vividly stated by **Viscount Heldane L.C. in Lennands Carrying Co. v. Asiatic Petroleum Co. Ltd**⁴

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 centre of the personality of the corporation.

¹See section 37 of the Companies and Allied Matters Act, Cap. C20, LFN, 2004 and *Saloman v. Saloman & Co.* (1897). A.C. 22. See also the cases of *Marine Management Association Inc & Anor v. National Maritime Authority* (2012) 18 NWLR (pt 1333) 506; *Lee v. Lee's Air Farming Ltd* (1961) A.C. 12; *Macaura v. Northern Assurance Co.* (1925) A.C. 619, and *Marina Nominees Ltd v. Fed. Board of Inland Revenue* (1986) 2 NWLR (pt. 20) 48. In *Short v. Treasury Commissioners* (1948) 1 KB 112, a controversy arose as to whether shareholders can be said to be real owners of the company in view of the principle of corporate personality and it was resolved in favour of the company where Lord Evershed stated that shareholders are not in the eye of the law, part owners of the undertaking of their company. See also *Nwiedoh K.B.* (1998). *The Rights and Status of a Shareholder of a Company Under the Companies and Allied Matters Act, 1990. CJLJ*, Vol. 4 at 206.

² See section 38 CAMA.

³ Hence the acts of the company's organs are those of the company – see section 65 CAMA. However, under section 66(1)(a) of the same Act, the authority of the other officers or agents of the company derives essentially from the delegation whether express or implied from the general meeting, the board of directors as well as the managing directors who are the company's organs.

⁴ (1915) A.C. 705 at 713-714.

Aniagolu, JSC (as he then was) approved and aptly summed up the view in **Trenco (Nig) Ltd v. African Real Estate Ltd**⁵ that ... “a corporation, although having a corporate personality is deemed to have human personality through its officers and agents”.⁶

This human element is as constituted in the body of directors referred to as the board of directors and also in the body of members constituted in the general meeting.⁷ The conception of company as a separate entity, and as such the exclusive owner of its own property is not just a convenient device for the ownership of business assets but also has a significant effect on the position of the members of the company, its directors and those who deal with it. While the nature of the relationship between the company and its directors is often described as that of principal and agent,⁸ on the one hand, that of the board of directors and the general meeting is still vague and has been a source of controversy for decades.

Until the end of the 19th Century, the shareholders in general meeting were usually regarded as the supreme organ of the company and directors as mere agents under the complete control of the shareholders in general meeting.⁹ However, this view has long faded out and been altered to the effect that the directors as a board are capable of exercising corporate powers independently from shareholders.

⁵ (1978) 1 L.R.N 146.

⁶ *Supra* at p. 153. See also the case of *Bolton (Engineering) Co. Ltd v. Graham & Sons* (1957) 1 QB 159 at 172-173, per Denning L.J.

⁷ Agom R. A. (2000). Powers of Court to Compel Company Meetings. *Modern Journal of Finance and Investment Law*, Vol. 4 No.3, 42. Other officers and agents of a company may also exercise managerial powers under some circumstances such as liquidator, receiver and any other person vested with such powers by the Memorandum or Articles of Association. See for instance, section 76 CAMA.

⁸ See *Ferguson v. Wilson* (1866) L.R. 2 CH. 77, per Lord Cairns. The Supreme Court in *Okolo vs. Union Bank of Nigeria Plc* (2004) 3 NWLR (pt 859) SC 89, held that a director of the company is in the eye of the law an agent of the company, such that when a director enters into a contract for a company, it is the company, the principal which is liable on it and not the director.

⁹ See for instance, the case of *Isle of Wight Railway Rly v. Tahourdin* (1883) 25 Ch.D 320 CA. See also the case of *North-West Transportation Co. v. Beatty* (1887) 12 App. Cas. 589, where the Privy Council held that shareholders are the owners of their own companies and accordingly can exercise their voting rights for selfish reasons even where the interest of the company is jeopardized.

The exercise of corporate powers is determined entirely by the construction of the Articles of Association; and unless as otherwise provided in the Articles, the board is to manage the company and exercise all powers not vested in the general meeting.¹⁰ Consequently, where powers have been vested in the directors, and so long as they act at a properly constituted board meeting and within the powers conferred on them by the Memorandum and Articles of Association, the general meeting cannot interfere with their exercise as the Articles constitute a contract by which the members agree that the “directors and directors alone shall manage”.¹¹

In exercising the powers conferred on them and discharging their duties therefore, the directors are neither bound by resolutions of the company in general meeting¹² nor to obey the directions or instructions of the members in general meeting; provided that the directors acted in good faith and with due diligence.¹³ This prevailing view seems to be consistent with reality because directors are professionals trained to direct and manage the affairs of the company.¹⁴ However, the directors’ powers as a whole, must be exercised in the best interests of both the company and all the shareholders, but not in their own sectional interests.¹⁵

One key feature of this managerial revolution is the temptation for the management to regard the company as essentially their own property and to look at their own interest in conducting the affairs of the company. The implication is that instead of trying to maximize the returns of investment for shareholders, those in management may be

¹⁰ See section 63(3) CAMA.

¹¹ See the case of *Automatic Self-Cleansing Filter Syndicate v. Cunningham* (1906) 2 Ch. 34 CA and *Quinard and Axtens Ltd v. Salmon* (1909) 1 Ch. 311 CA; *Shaw v. Shaw* (1953) 2 K.B. 113 CA; *Scott v. Scott* (1943) 1 All E.R. 582.

¹² See *Gramophone and Typewriters Ltd v. Stanley* (1908) 2 K.B. 89.

¹³ See sections 63(4) & 282(1) CAMA. The same standard of care as required in section 282(1) applies to both executive and non-executive directors – section 282(4). By section 64 of the Act the board of directors if so authorised by the Articles may delegate some or all of its powers to the Managing Directors or a committee of the directors.

¹⁴ See section 244 CAMA.

¹⁵ Sections 283(1) & 279(2) CAMA. See also sections 282(1), 279(3) of the Act and the case of *Okeowo v. Milgore* (1979) 11 SC 133, per *Eso JSC*, relating to the company alone.

concerned with making decisions that will preserve the company and its business; preserve managers' control over the company, and encourage growth and empire building in order to enhance their own well being rather than that of the shareholders'. In this regard, managers are often in position to fix their salaries generously in relation to the company's profit. They may also arrange for themselves other fringe benefits. To put the matter bluntly, managers often take advantage of their control over the company to feather their nest.

1.2 STATEMENT OF THE RESEARCH PROBLEM

The two concepts of juristic personality and abstraction theory of a company absolutely necessitate the separation of corporate ownership and control. This separation leads to potential divergence between the interests of owners (principals) and managers (agents) who exercise control over the decisions affecting the company. The problem therefore is aligning interests. Seeing that directors are the managers and also agents of companies, the question is whether there are adequate and appropriate provisions in the law for aligning the interests of the director with those of the company? How can the principal ensure that the agent always acts in a way that is consistent with the principal's objectives?

1.3 AIM AND OBJECTIVES OF THE RESEARCH

This research aims at critically examining the concept of corporate ownership and control in the light of general corporate laws in Nigeria. The objectives are: firstly, to provide answer to the central question of corporate interests; secondly, ensuring that there exists enhanced management accountability and transparency.

1.4 SCOPE OF THE RESEARCH

The scope of this research is limited to the central issues of interests and accountability arising from the separation of corporate ownership and control in Nigeria. The study

examines the relevant provisions of the Companies and Allied Matters Act, 2004 as well as the Code of Corporate Governance by Securities and Exchange Commission, 2011 and Code of Corporate Governance for Banks, 2006 by the Central Bank of Nigeria, respectively, among so many other corporate laws. Additionally, due to the global relevance of the subject matter of the research, references to and cases from foreign jurisdictions have been extensively used.

1.5 RESEARCH METHODOLOGY

The research is largely based on doctrinal method. Two types of data – secondary and primary sources – are used in this research. Primary sources of data which are case law arising out of the decisions of courts and relevant statutes have been extensively used in writing this research. On the other hand, the secondary sources of data used in this research include text books, journals, magazines, newspapers and internet. This, it is strongly believed, will help for scholarship and deep appreciation of the subject matter. In all, an analytical mode of writing has been adopted followed with a descriptive style wherever necessary. Relevant data collected from different sources are duly acknowledged and analyzed at the foot of every page where they appear; and adequate recommendations made thereon.

1.6 REVIEW OF RELATED LITERATURE

Most of the available works and corporate governance deal with the concept of corporate ownership and control. Reference to the separation of ownership and management, and concern over its effect; go back at least to 1776 when **Adam Smith**,¹⁶ writing about joint stock companies, stated:

¹⁶ Smith, Adam (1776). *An Inquiry Into The Nature And Causes Of The Wealth Of Nations* (5th ed.). New York. Bantam Dell.

The directors of such companies, being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matter as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of affairs of such a company.

Adam Smith's 'Wealth of Nations' is perhaps the major driving force for several modern economists to develop new aspects of organizational theory. Smith's basic contribution, therefore, was his ability to create insight into the need for managerial accountability. His criticism was focused on both the owners and the managers. Logically, he had stated that the equity owners quite often show that they have no knowledge or understanding of the business of the company. For the directors of an enterprise, he said that they cannot be expected to oversee the business activities with the same vigil and interest as the partners of a private organisation. In other words, their interest will be low since the equity invested in the business does not belong to them. On the whole, Smith's work was an explicit statement about laxity and levity on the part of corporate managers.

The major demerit of Adam Smith's work was that it is not contemporary with modern reality. Whereas the view of Adam Smith is quite valid but in the backdrop of the emerging global market and explosion of expertise and knowledge, there has got to be two sets of bodies-one that provides the capital and the one which manages. Of course, the complications of modern commercial enterprise make it virtually essential that the matters should be left to experts.

In 1932 Adolf Berle and Gardiner Means coined the phrase "the separation of ownership and control". In their seminal book, *The Modern Corporation and Private*

Property,¹⁷ **Adolf Berle** and **Gardiner Means** alerted the public to the consequences of the emerging modern corporation in which ownership of shares, due to its diffusion, is separated from control. They identified the situation in the United States of America whereby the need for capital in larger companies was leading to the situation where no individual shareholder held a large or significant percentage of shares. They argued that this dispersion of capital among an increasing number of small shareholders has consequently led to a weakness of control by these shareholders over the activities of management. In Berle and Means' eyes, not only were managers in charge of the management of the company, but they were also in control of the control.

The book is well written and moreover, it shows evidence of deep research, particularly with regard to use of primary data. Also, it was one of the first few works elucidating separation of corporate ownership and control.

While acknowledging that Berle and Means have done a great work, their description of separation of ownership and control that was the main theme of their book was a pejorative one and also their understanding of the concept was rather pessimistic. They did not consider the evolution of the corporation as a positive economic force. Rather, they largely considered the emergence of the modern corporation in which managers were omnipotent and continuously expropriate dispersed shareholders as a market failure and the implications of their work was that the government must intervene to correct this market failure. They failed to realize that there is a difference between saying that there is a dispersion of stock holdings and a separation of ownership and control. The dispersion of stock holdings does not necessarily imply that managers are omnipotent and continuously expropriate shareholders. It is also interesting to note that while Berle and Means acknowledged the relationship between property rights and

¹⁷ Adolf A. Berle Jr. and Gardiner C. Means (1932). *The Modern Corporation and Private Property*. New York. The Macmillan Company.

incentives, they never saw the implications of their statement with regards to the problem of separation of ownership and control.

Closely related to Berle and Means' work is Paul Davies 'Principles of modern company law'¹⁸ which is concerned with corporate investment. **Paul Davies** while accepting Berle and Means' view explained that direct or indirect investment in companies constitutes the most important single item of property for most people¹⁹ but whether this properly brings profit to its owner no longer depends on their energy and initiatives but on that of the management from which they are merely reduced to suppliers of capital. The book is useful for its treatment of the topic under consideration. However there are embodied in the statement two concepts that are at odds with current analyses of the separation of ownership and control. First, modern analyses do not take as its ideal the notion that the shareholder should have the ability to monitor or control management. Indeed, policies that encourage shareholder control may undermine the benefits of separation of ownership and control. Rather, much modern analysis has focused how actors other than shareholders may effectively monitor and constrain managerial behaviour. Second, and perhaps more importantly, many modern analyses do not assume that it is socially desirable for managers to act in the interests of their current principals. The assumption of owners as mere suppliers of capital as stated by Paul Davies, therefore does not accord with realism. **Jensen and Meckling**,²⁰ have expressed concern that the issues of the "separation of ownership and control" in modern corporations are purely associated with the general problem of agency in which they described the relationship of managers and shareholders in relation to corporate affairs as that between the agent and the principal. There is therefore an element of risk that the manager as agents may choose to act in their own

¹⁸ Davies P.L. Gower and Davies (2003). *Principles of Modern Company Law* (7th ed.). London. Sweet & Maxwell, at 291

¹⁹ After home ownership

²⁰ Jensen, Michael C. and Meckling, William H. (1976). Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure. *Journal of Financial Economics*, 305-360.

interests rather than the interest of shareholders. According to them, the principal is able to limit the divergences from his interest through the creation of various incentives to which the agent can benefit from and engaging in monitoring costs aimed at limiting future deviant activities of the agent. For example, providing bonding costs for the agent to guarantee that he will not harm the principal, and where this happens, ensuring that the principal is compensated. Though Jensen and Meckling mentioned the important role of monitoring in an agency relationship, they do not examine further how a large firm achieves efficient monitoring. In other words, how do firms structure their corporate governance in order to control the agency problem created by the separation of ownership and control? Similarly, Jensen and Meckling's suggestion for giving of incentives as a way of aligning the divergent interests of corporate stakeholders is quite an unrealistic assumption as managers have different preferences, goals, etc. There is therefore no unique line of behaviour expected of managers with regard to incentives.

Fama and Jensen, in their seminal paper,²¹ predicted that the separation of ownership and control leads to the decision systems that separate decision management from decision control. They broadly define decision management as the initiation and implementation of decisions, and decision control as the ratification and monitoring of decisions. As the board of directors is the common apex of the decision control system of organisations, their hypothesis implies that the greater the separation of ownership and control, the greater will be the separation of management and the board of directors. A testable implication of Fama and Jensen's hypothesis, therefore, is that board independence increases in the degree of the separation of ownership and control. Jensen and Meckling's prediction on the issue is very weak and of limited application because most public companies have major owners who are likely to act as managers.

²¹ Fama, E.F. and Jensen M.C. (1983). Separation of Ownership and Control. *Journal of Law and Economics*, Vol. 26, 2, pp. 301-325

It is in the foregoing context that **Shleifer** and **Vishny**'s suggestions become apposite. **Shleifer** and **Vishny**²² have suggested that if the individual is protected in the right both to use his property as he sees fit and to receive the full fruits of its use, his desire for personal gain, for profits, can be relied upon as an effective incentive to his efficient use of any industrial property he may possess. They further suggested that when control rights are concentrated in the hands of a small number of investors with a collectively large cash flow stake, concerted action by investors is much easier than when control rights, such as votes, are split among many of them. In particular, the majority shareholder has the incentive to collect information and monitor the management, thereby avoiding the traditional free rider problem faced by investors of widely held firms. The majority shareholder also has enough voting control to put pressure on the management in some cases, or perhaps even to oust the management.²³ The shortfall in this suggestion is the clear lack of appreciation for the enormous benefits inherent in the separation of ownership and control of companies. Certainly, it would be very difficult to have a large number of shareholders – or even a relatively small number of shareholders – attempting to run the business directly through democratic means. Management by rationally apathetic shareholders would be both logistically problematic and substantively unwise. In contrast, decisions making is much more efficient with separating ownership and control. Many authors believe that directors and managers are the agents of shareholders and therefore responsible for maximizing the shareholders' interest. **Ayua Ignatius**,²⁴ one of the proponents of this belief, holds the view that the residuary powers of the company do reside in the general meeting of shareholders acting by ordinary resolution and that so far as traditional company law is concerned directors are no more than the agents of the

²² Shleifer, A. and R.W. Vishny (1997). A Survey of Corporate Governance. *Journal of Finance*, 737-783

²³ See Shleifer, A. and Vishny R.W. (1986). Large Shareholder and Corporate Control. *The Journal of Political Economy* (3, Part 1), 461-488

²⁴ Ayua Ignatius (1976). *The Contest Between the Shareholders and the Directors* (Unpublished LLM Dissertation). Faculty of Law, A.B.U. Zaria.

shareholders. He has argued that to hold otherwise will be to dissimulate the purely instrumental character of a company as a private property of shareholders. However, **Kay** and **Silberston**,²⁵ offer a dissenting view and argue that a public corporation is not the creation of private contract and thus not owned by any individual. According to them, company law does not explicitly grant shareholders ownership rights because the corporation is regarded as an independent legal person separate from its members and shareholders are merely the “residual claimants” of the corporation.

This view as held by Kay and Silberstein agrees more with section 37 of the Companies and Allied Matters Act, 2004 and therefore more appealing and acceptable. The fact that, from an economic view point, shareholders collectively are regarded as the ‘owners’ of the company does not alter the conclusion that the individual shareholder’s right are not equivalent to “ownership” rights, i.e., rights to control and protect the property as well as to assert damage claims. The corporate law views shareholders’ relationship to the company as merely contractual. The substantive content of the contract is found in the company’s articles of association and in the Act. Therefore, shareholder neither has direct ownership rights in the capital which he has invested in the company, nor ownership of an interest proportionate to his investment in any corporate property. He merely has a contractual right to receive his proportionate share of corporate property when it is distributed.

There is also a controversy among scholars and other stakeholders as to the appropriate authority to which the company executives should be accountable. One school of thought is of the opinion that they should be accountable to the public or government since a company is created by government. **Dodd**,²⁶ one of the pioneer proponents of this view

²⁵ Kay J. & Silberston A. (1995). Corporate Governance. *National Institute Economic Review*, 84; pp. 84-97

²⁶ Dodd, D. (1935). Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable? *University of Chicago Law Review*, 2; 194, 203-204, but see Karmel, S. R. (1991) Is It Time For a Federal Corporation Law? *Brooklyn Law Review* 55

argued that since companies were brought about by the state, the state should regulate the absolute control of corporate property exercised by corporate managers not only for the benefit of shareholders but also for society at large. He viewed corporations as autocratic merchant state that derived their powers from the government and must be brought under government control for the benefit of society at large. In the same vein, **Raph Nader**,²⁷ reinforced this position when he stated in 1970s that in view of the fact that the economic corner stone of corporate control has broken down, government should get more involved in the control of corporations.

Another school of thought has advocated that the company executives should be made accountable to the shareholders only. Spearheading this argument is **Berle and Means**²⁸ who viewed corporate officers as representatives and was concerned about making corporate managers more responsive to the economic interests of shareholders. They hypothesized that shareholders had surrendered control of the corporation to management and that such control needed to be returned to shareholders through the enforcement of fiduciary duties owed to them by officers and directors. Nevertheless, **Harold William** warns that even when the directors are held accountable to the shareholders; it is not just individual shareholders but an institution.²⁹

1.7 JUSTIFICATION

Corporate governance is a relatively new area of study that is currently attracting interest among a wide spectrum of people. The realization that companies are so important as they dominate the economic sphere of every nation and the rapid spate of corporate collapses witnessed globally in recent times have put in focus the subject of the research.

²⁷Contained in Karmel, S. R. (1991). Is It Time For a Federal Corporation Law? *Brooklyn Law Review* 58.

²⁸ Karmel, S.R., op. cit

²⁹ See Harold William (1991). Re-examination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generall. Exchange Act Release No. 13, 482. In: Karmel, S.R. op cit at 61

Similarly, given the paucity of literature on the topic in Nigeria specifically and Africa generally and also the necessity to bring the law up to date using new methods, this research is important and has come about at the nick of time.

It is fervently hoped therefore that the research will be of tremendous interest and assistance to financiers, economists, behavioural scientists, legal practitioners and business operators. The research is also expected to help the developing countries like Nigeria who are in dire need of development and also most developed nations like America and Europe with recent history of financial scandals leading to collapse of major corporate institutions.

1.8 ORGANIZATIONAL LAYOUT

This research is organized into five chapters for adequate treatment and comprehension of the subject matter. Chapter one generally introduces the main features of the research, including the problem, aim and objectives, scope, methodology, review of related literature and justification, all in a consequential order. Chapter two discusses the concepts of ownership, management and control of a company. It further examines shareholders' rights and the nature of their interest in the company. Chapter three extensively discusses the wide-ranging powers of directors and the controls attached thereto as well as the remedies for the attendant breaches. Chapter four takes cognizance of the need for the practice of good corporate governance and discusses the codes of corporate governance as formulated by Securities and Exchange Commission (SEC) and Central Bank of Nigeria (CBN) for companies and banks in Nigeria, respectively, and their impact on corporate management. Finally, chapter five draws some general conclusions based on the findings and offers some useful recommendations.

CHAPTER TWO

OWNERSHIP, MANAGEMENT AND CONTROL OF A COMPANY

2.1 INTRODUCTION

The corporate personality rule clearly draws a demarcation between the company and its owners. In the past, the ownership and control of companies were usually merged and vested in the same persons; today, however, with the nature of limited liability companies more especially that of public companies and the spread of investment consciousness in the society, it is almost practically impossible for the affairs of companies to be officially and effectually managed by the shareholders. Therefore, management has been divorced from ownership. It is therefore the purpose of this chapter to examine the relevant provisions of the Companies and Allied Matters Act¹ governing the division and exercise of powers as it affects the corporate organs with a view to ascertaining who truly controls the company and for whose benefits is a company formed, within the fundamental and well accepted conception of separation of ownership from management and control.

2.2 THE CONCEPT OF OWNERSHIP

The term ownership is a controversial one and hardly has any settled meaning. A whole lot of jurisprudence has been expended and weighty discourse made on the meaning of the term.² Therefore, no further attempt will be made here, since, as **Pollock** said, “there is...rather too much talk about definitions. A definition, strictly speaking, is nothing but an abbreviation in which the user of the term defined may please himself...”³

¹ Cap. C20 LFN, 2004

² See for instance, Dias, R. W. M. (1976). *JURISPRUDENCE* (4th ed.). London Butterworths, page 402-403 and Nwabueze B. O. (1972) Nigerian Land Law. Nwanife Publishers Ltd, pg. 9

³ Book Review, 47 L.Q.R. (1931), 588

Ownership is simply defined as the collection of rights allowing one to use and enjoy property, including the right to convey it to others.⁴ It therefore follows from this definition that ownership can be described in relation to something that is capable of being “owned” or belonging to a particular person. It also consists of claims, rights or powers exercisable by a person or persons over a piece of property.

Legally, ownership is viewed as a bundle of rights specified in a contract that defines the relationship between individuals with respect to material or immaterial object.⁵ It is where the owner has exclusive rights of possession, use, gain and legal disposition of a material or an immaterial object.

Loh and Zin⁶, defined ownership as the legal right over the use of factors of production of a company whereas control is the authority over the course of action of the company.

The concept of ownership is better appreciated against the background of company practices where the corporate personality rule exists to the effect that upon incorporation, the company becomes a legal person albeit artificial, separate and distinct from its members and directors.⁷ The separate legal personality of the company means that its property must be regarded as distinct from that of its shareholders, despite the fact that those shareholders collectively have ultimate legal authority over its use and disposal. Thus, no single shareholder is entitled to regard the company’s property as his own regardless of the extent of his interest in or control over its affairs.

Traditionally, shareholders are considered to be the ‘owners’ of the company whereas the directors only control or manage its affairs. As providers of the finances of the company,

⁴ See *The Black’s Law Dictionary* (7th ed.) (1999). West.

⁵ Grunebaum, J.O. (1987) *Private Ownership*. London and New York: Routledge & Kegan Paul.

⁶ Loh, L.H. and Zin R. (2007). *Corporate Governance: Theory and Some Insights into the Malaysian Practices*.

⁷ S. 37 CAMA. Judicial recognition of this principle of independent corporate existence of a company was first established in the famous case of *Salomon v. Salomon Co. Ltd* (1897) A.C. 22 and later reaffirmed in Nigeria by the Supreme Court in *Marina Nominees Limited v. Federal Board of Inland Revenue* (1986) 2 NWLR (Pt. 20) 48 at p. 61

shareholders usually appoint the directors as managers of the affairs of ‘their’ companies. Consequently, the directors are expected to conduct company’s affairs in the sole interest of those shareholders. This also implies that the profit motive should prevail and decisions on the future of the company ultimately be determined by the search for the best possible long-term return on capital, even if that means the liquidation of a particular company and the reinvestment of the capital it employs elsewhere. Thus, ownership is looked at from the view point of the shareholders while the control element is for the directors. Hence, the Privy Council in **North-West Transportation Co. v. Beatty**⁸ held that shareholders are regarded as the owners of their companies and can accordingly exercise their voting rights for selfish reasons even where the interest of the company is jeopardized.⁹

However, the management has an obvious vested interest in the survival of the company as a source of personal livelihood and may often regard the interests of shareholders as subordinate to those of the company. Prentice had stated that the view that the shareholders are sole owners of their companies is the older view and was more fashionable in the 1970s and early 1980s but there are other interests as well; such as the interest of directors. As such, it has been argued that the interests of the management must be considered so that they can be afforded an opportunity to take a long-term view of the company’s commercial needs rather than be compelled by extraneous pressures to adopt a short-term strategy to maximize shareholders’ value.¹⁰

Thus, contrary to the earlier notion that shareholders are the owners of their companies exercising management powers and the directors their agents; it was later appreciated and

⁸ (1887) 12 App. Cas. 589

⁹ See also the case of *Isle of Wight Railway v. Tahourdin* (1883) 25 Ch.D 320 where the court refused an application by directors of a company for an injunction to restrain the holding of a general meeting; one of the agenda of the meeting was to appoint a committee to reorganize the management of the company. The Court was of the opinion that the directors were mere agents of the general meeting.

¹⁰ See Prentice D.D. (1993). *Aspects of Corporate Governance Debate*. In: Prentice D.D. and Holland P.R.J. (eds.) *Contemporary Issues in Corporate Governance*. Clarendon Press: Oxford Allen & Overy, at 29.

now the prevailing view that shareholders are not part owners of the undertakings of their companies. As pointed out by **Evershed L.J.**, in **Short v. Treasury Commissioners**,¹¹ shareholders are not, in the eye of the law, part owners of the undertaking of their companies but that the undertaking is something different from the totality of the shareholdings. Commenting on this decision, **Kiser Nwiedoh**¹² stated that from this common law decision, it could be deduced that corporate property is clearly distinguished from the members' property and thus members have no direct proprietary interest in the company property but merely interest in their shares. Therefore, the shareholder, in **Cohen LJ**'s description, has only the right to have all the assets administered by the directors in accordance with the constitution of the company.¹³ This view is further supported by section 37 of the Act¹⁴ which stipulates that upon incorporation, a company becomes a body corporate by the name contained in the memorandum. The property rights conception of corporate ownership does not foresee any intervention of shareholders into issues that are the prerogative of the managers and directors. Thus, the effect of shareholders on corporate strategy and governance is not assumed to be direct but, if present at all, is mediated by their votes at the annual general meeting.

This phenomena change was brought about by the decision in the case of **Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame**,¹⁵ where the English Court of Appeal made it clear that the division of powers between the board and the company in general meeting depended in the case of registered companies entirely on the construction of the Articles of Association and that, where powers had been vested in the board, the general meeting could not interfere with their lawful exercise. The Articles were held to constitute

¹¹ *Short v. Treasury Commissioners* (1948) 1 K.B. 112.

¹² Nwiedoh K.B. (1998). *The Rights and Status of a Shareholder of a Company Under the Companies and Allied Matters Act, 1990. C/LJ*, Vol. 4 No. 4 at 209.

¹³ *Hood-Barrs v. IRC* (1946) 2 All ER 768, 775. See also the cases of *Short v. Treasury Commissioners* (1948) 2 All ER 509, 512, and *Macaura v. Northern Assurance Co. Ltd* (1925) AC 619.

¹⁴ CAMA

¹⁵ (1906) 2 Ch. 34. See also *Gramophone & Typewriter Ltd v. Stanley* (1908) 2 K.B. 89.

a contract by which the members had agreed that “the directors and the directors alone shall manage”. Hence, the directors are entitled to refuse to carry out a sale agreement adopted by ordinary resolution in general meeting.¹⁶

This position was also accepted in the case of **Quinard & Axtens v. Salmon**¹⁷ where it was held that where the relevant articles are in the normal form exemplified by successive Tables A and management powers are vested on the directors, the general meeting cannot interfere with a decision of the directors unless they are acting contrary to the provisions of the Act or the Articles.¹⁸ In the corporate system, therefore, the “owner” of industrial wealth is left with a mere symbol of ownership while the power, the responsibility and the substance which have been an integral part of ownership in the past are being transferred to a separate group in whose hands lie control.

2.3 THE THEORIES OF CORPORATE PURPOSE

Recent debates about corporate law focus mainly on two contrasting theories of the corporation - shareholder theory and stakeholder theory – often referred to as contractarianism and communitarianism, respectively. While the shareholder theory exclusively emphasizes the priority of shareholders’ interest over stakeholders, by contrast, the stakeholder theory attempts to legitimize wider stakeholders’ interests by rejecting the priority of shareholding value. Shareholder theory sets the purpose of the firm as the maximization of financial returns for shareholders. On the other hand, Stakeholder theory expresses the idea that business organizations are dependent upon stakeholders for success. It suggests that the purpose of the firm is to serve broader societal interests beyond economic value creation for shareholders alone. Under each

¹⁶ Tahourdin’s case was distinguished on the ground that the wording of section 90 of the Companies Clauses Act 1845 was different – though that section does not in fact seem to have been relied on in the earlier case

¹⁷ (1909) A.C. 442

¹⁸ See also the cases of *Shaw & Sons (Salford) Ltd V. Shaw* (1935) 2 K.B. 113 and *Scott v. Scott* (1943) 1 ALL E.R. 582

theory are a number of sub theories with different implications for corporate law and therefore reform.

2.3.1 SHAREHOLDING THEORY OR CONTRACTARIANISM

2.3.1.1 Inherent Property Rights Theory

The inherent property rights conception is a very traditional wisdom based on the view that private ownership is fundamental to a desirable social order and to the development of an efficient economy. Thus, private ownership rights are inviolable in any way. Under this theory, assets of the corporation are the property of the shareholders, and the directors and managers as agents of shareholders have no legal obligations to any other stakeholders.¹⁹ The new form of corporate property is the aggregation of individual property rights under a collective name, united by contract and protected by company law. Since shareholders are the owners of the corporation, the corporation has legitimate obligations and managers have a fiduciary duty to act in the interest of the shareholders. Inherent property rights theory has been associated in modern times with the Chicago School of Law and Economics.²⁰

The neoclassical economists Frederick Von Hayek and Milton Friedman are the major supporters of a liberal and individualist approach to property and corporate governance. For Hayek,²¹ individuals owning private property and pursuing their self-interest ensure the most efficient economic activities and outcomes. Thus, the corporation that uses shareholders' capital must aim at maximizing profits to enhance shareholders' value. If a corporation uses profits for any social purpose beyond the shareholders' interest, this

¹⁹ Allen W.T. (1992). Our Schizophrenic Conception of the Business Corporation. *Cardozo Law Review*, Vol. 4, pp. 261-281. See also M.M. Blair, op. cit.

²⁰ See also Companies and Allied Matters Act, Cap. C20, LFN, 2004, section 279.

²¹ Hayek, F.A. (1969). The Corporation In A Democratic Society In whose Interest Ought It And Will It Be Run? In: Ansoff H.I.(ed.). *Business Strategy*, Penguin, Harondsworth, 1969, Retrieved from www.findlaw.com.

could be interpreted as managers' abuse of power and the allocation of corporate resources will not be efficient. Hayek goes on to argue that shareholders' property rights in the corporation must be fully protected and shareholder control of the corporation must be strengthened.

Nobel Laureate Milton Friedman²² also strongly argues in favour of maximizing financial return for shareholders. His capitalistic perspective clearly considers the firm owned by and operated for the benefit of the shareholders. According to him, other stakeholders' interests are served by contract or through government regulation and should not be justified in corporate governance.

2.3.1.2 Agency Theory

Under this theory, the central issue of corporate governance is equal to the problem of agents' self-interest behavior in a principal-agent relationship. A principal-agent relationship means that the principal (shareholder) delegates works to the agent (director and manager) who performs that work on behalf of the principal.²³ Based on the assumption of individuals maximizing their own utility, the agency theory asserts that managers as agents will not always act in the best interests of shareholders and may pursue their own interest at the expense of the shareholders.

Agency theory concerns two problems occurring in the principal-agent relationship. The first is the difficulty or expense involved in the principal monitoring the agent's behavior and routine actions. The second problem is the different preferences concerning interaction between the principal and the agent because of their different attitudes towards risk. Those problems lead to a particular type of management cost – “agency cost” –

²² Friedman, M. (1970). The Social Responsibility of Business is to Increase its Profits. *New York Times Magazine*, September 13, Section 6, pp. 32-33, 122, 124, 126

²³ Eisenhardt K.M. (1989). Agency Theory: An Association and Review. *Academy of Management Review*, 14; pp. 57-74.

incurred as principals/owners attempt to ensure that agents/managers act in principals' interests.²⁴ The agency theory then focuses on solving the above problems by determining the most efficient contract governing the principal-agent relationship.

The determination depends on the availability of complete information. Today, the need to align the interests of the directors with those of the shareholders has led to giving director's performance bonuses linked to the performance of the organization.

This alignment and the framework of agency theory underpin how entrepreneurs and directors are compensated in today's new ventures.

The above discussion conforms to company law which regards directors as agents of shareholders. This necessity for human agents was recognized by **Lord Cairns** in **Ferguson v. Wilson**²⁵ where he stated that a company itself cannot act in its own person, for it has no person, but can only act through agents like the company directors. In order to ensure that the agents act in the principal's interest, rules were made to check the activities of the agents. For instance, the fiduciary duties of directors to act bonafide, to act in the best interest of the company, not to misuse corporate information, etc were made to enable directors to act in alignment with the wishes of the shareholders.

2.3.1.3 Stewardship Theory

The stewardship theory takes a different view on the nature of human beings from the agency theory and others. While the agency theory is built on the assumption of self-interest of human behaviour to assert that managers as agents cannot be trusted and should be fully monitored, the stewardship theory criticizes it as a false premise and claims instead that the managers are good stewards of the corporation. Based on a traditional

²⁴ Jensen and Meckling, op. cit.

²⁵ (1866) 2 Ch. 77 at 89

legal view of the corporation as a legal entity in which directors have a fiduciary duty to the shareholders, the stewardship theory argues that managers are actually behaving just like stewards to serve the shareholders' interests and diligently work to attain a high level of corporate profit and shareholder returns. This was the basis of the stewardship theory of corporate governance²⁶ and this forms one stream of argument. Directors are considered to be stewards of a corporation.

Managers have a wide range of motives beyond a simple self-interest, such as achievement, recognition and responsibility needs, the intrinsic satisfaction and pleasure of successful performance, respect for authority, social status and work ethics. Thus, the separation of ownership from control does not inherently lead to a goal and interest conflict between shareholders and managers. The separation actually promotes the development of managerial profession, which is certainly beneficial for corporate performance and shareholders wealth. In this regard, empowering managers to exercise unencumbered authority and responsibility is necessary for the maximization of corporate profits and shareholders' value.

To buttress this theory, directors, being managers of corporations, are imposed with a duty to act at all times in what they believe to be in the best interest of the company as a whole, so as to preserve its assets, further its business, and promote the purpose for which it was formed. In doing so, the director is to act in such a manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstance.²⁷

²⁶ Donaldson Lex and Davies James (1994). Stewardship Theory or Agency Theory: CEO Governance and Shareholders Returns. In: Tricker Roberts (ed.). International Corporate Governance, pp. 124-134. Retrieved from www.findlaw.com.

²⁷ CAMA, Section 279(3)

2.3.1.4 The Finance Model

In a broad view, the finance model can be incorporated into the agency theory as a principal-agent or finance model.²⁸ Because both are concerned with the effectiveness of market governance in ensuring that managers will act to maximize shareholders' wealth. In the strict sense, the finance model refers to the presupposed optimum of market-based governance asserted by financial economists, and is particularly associated with H.G. Manne,²⁹ who advocated the market for corporate control. Thus, it is also called the "efficient market model".³⁰ The finance model played a crucial role in the corporate governance structure over the second half of the Twentieth Century, especially in the 1980s' takeover movement.

A theorem in financial economics is that the share price today fully reflects the market value of all future profits and growth that will accrue to the company. believing in this assumption, the advocates of the finance model hold that shareholders' interests are best served by maximizing share price in the short run. The share price is an indicator of corporate performance and the stock market is the only objective evaluation of management. If a firm underperforms, its share price will be lower, which provides a chance for outsiders to buy the firm's stock and run the firm more efficiently in order to obtain larger management with an incentive to make efforts to perform better and maximize shareholders' return in order to make their firm bid-profit. Therefore, if the separation of ownership and control allows managers' behaviour to deviate from shareholders' value of profit maximization, the pressures of capital markets and takeovers are the most effective disciplines on managerial discretion.

²⁸ Keasey K, Thompson, S. & Wright M. (1997). Introduction: The Corporate Governance Problem – Competing Diagnosis and Solutions. In: K. Keasey K., Thompson S., and Wright M. (eds.). *Corporate Governance and Financial Issues*. Oxford. Oxford University Press, p. 14.

²⁹ Manne, H.G. (1997). Mergers and The Market for Corporate Control. *Journal of Political Economy*, 75; pp. 110-126
In: Steve Letza and Xiuping Sun, op. cit

³⁰ Blair M.M. op. cit., p. 107

Supporters of the finance model argue that corporate governance failures are best addressed by removing restrictions on factor markets and the market for corporate control.³¹ Shareholders' residual voting rights on takeover should be enhanced. They reject any ex-post external interventions and additional obligations imposed on corporations which may distort free market mechanisms.³² If any measure can be introduced to improve governance and to raise the value of the firm, it should be adopted without compulsion, such as a voluntary code adopted by Cadbury.³³

This theory may have influenced the imposition of directors' duties³⁴ in the course of managing the affairs of the company so that shareholders' value of profit maximization would be achieved. This is why company law formulated principles to ensure the maintenance of company's share capital thereby protecting the company from abuses by the directors. Once the company has received payment for its shares, the theory is that the nominal share capital is to be kept intact.³⁵ With this principle a company is bound to perform efficiently and its share price listed high at the security markets.

2.3.1.5 The Myopic Market Model

The myopic market model shares a common view with the agency theory that the corporation should serve shareholders' interest only. However, the model criticizes the Anglo-American model of corporate governance as being fundamentally flawed by an over-concern with a short term interest – short-term return on investment, short-term corporate profits, short-term management performance, short-term stock market prices and short-term expenditures, due to huge market pressures. This model argues that the current

³¹ Fama E. (1980). Agency Problems and the Theory of the Firm. *Journal of Political Economy*, Vol. 88, pp. 228-309.

³² Hart O. (1995). Corporate Governance: Some Theory and Implications. *The Economic Journal*, pp. 678-689.

³³ Keasey et al, op.cit.

³⁴ See CAMA sections 279-285.

³⁵ CAMA, sections 159-165.

corporate governance systems encourage managers to focus on short-term performance by sacrificing long-term value and competitive capacity of the corporation.³⁶ One of the features of the system is that the evaluation of both corporate performance and managerial efforts is heavily reliant on short-term financial measurements, often judged on a 1-year basis, sometimes even on a quarterly basis. Managers are forced to pay more attention to short-term earning data and forecasts and less attention to long-term investment spending. It is also argued that the stock market is not a good indicator of corporate performance because it is unable to cope with uncertainty and thus routinely misprices assets. The prices of shares often change without any corresponding change in the underlying fundamentals. Share prices may simply result from guesses about the behaviour and psychology of market participants and the changing moods and prejudices of investors, rather than from the estimations of corporate fundamental values.³⁷ Therefore, the market for corporate control is not an efficient disciplinary mechanism. The threat of a hostile takeover may distort and distract from true value creation as managers may be forced to act against the hostile takeover, which results in negative consequences.

The myopic market model contends that corporate governance reform should encourage shareholders and managers to share long-term performance horizons. This includes increasing shareholders' loyalty and voice, reducing the ease of shareholders' exit, restricting the takeover process and voting rights for short-term shareholders, encouraging "relationship investing" to lock financial institutions into long-term positions and

³⁶ Hayes, R.H. & Abernathy W.J. (1980). Managing Our Way to Economic Decline. *Harvard Business Review*, 58; pp. 67-77. See also Sykes A. (1994). Proposals for Internationally Competitive Corporate Governance in Britain and America. *Corporate Governance*, 2; pp. 187-195, and Moreland P.W. (1995). Alternative Disciplinary Mechanisms in Different Corporate Systems. *Journal of Economics Behaviour and Organization*, 26; pp. 17-34.

³⁷ Steve Letza and Xiuping Sun, Op. cit. p. 49.

empowering other groups such as employees and suppliers to form long-term relationship with the firms.³⁸

This theory may have also influenced the imposition of directors' duties³⁹ in the course of managing the affairs of the company so that shareholders' value of profit maximization would be achieved and perhaps the reason why financial institutions now engage in long-term investments.

2.3.2 STAKEHOLDING THEORY OR COMMUNITARIANISM

2.3.2.1 Social Entity Theory

The social entity conception of the corporation is directly at odds with inherent property rights theory and regards the corporation not as a private association united by individual property rights, but as a public association constituted through political and legal processes and as a social entity for pursuing collective goals with public obligations.⁴⁰

This perspective is primarily associated with communitarian theories that view the corporation as a political tool for social purposes⁴¹ and the communitarian view of property conditionality which argues that individual property rights are conditioned and restrained in a social context and in a community.⁴²

The social entity theory views the corporation as a social institution in society based on the grounds of fundamental value and moral order of the community. As Sacks⁴³ suggests, our attachments and affiliations, loyalties and likes are both moral and fundamental: "they enter into our identity, our understanding of the specific person we are and cannot be

³⁸ Keasey et al, op. cit.

³⁹ See CAMA, sections 279-285

⁴⁰ Gamble A, and Kelly G. (2001). Shareholder Value and the Shareholder Debate in the UK. *Corporate Governance*, Vol.9, pp. 110-117.

⁴¹ Dine J. (2000). *The Governance of Corporate Groups*, Cambridge. Cambridge University Press, pp. 17-27.

⁴² Warren R.C. (2000). *Corporate Governance and Accountability*. Bromborough. Liverpool Academic Press, pp. 130- 143.

⁴³ Ibid, p. 130.

reduced to contractual alliances for the temporary pursuit of gain”. The justification of intrinsic values as good or morally right and ideal is ultimately an emotional faith such as “I support it because I believe it”.⁴⁴ With the fundamental value of human rights and morality as a reference framework, the standard of a corporation’s usefulness is not whether it creates individual wealth but whether it helps society gain a greater sense of the meaning of community by honouring individual dignity and promoting overall welfare.⁴⁵

Corporations are granted by the state not only as an economic entity for a commercial purpose, but more importantly, as a social entity for general community needs. The corporation has a collective, rather than individual identity and executives are representatives and guardians of all corporate stakeholders’ interests.⁴⁶

This theory is buttressed by the corporate social responsibility theory which requires that corporations acknowledge and discharge social as well as private responsibilities to members of the communities in which they operate.⁴⁷ So far, this theory has been accepted in the United States of America and United Kingdom. Attempt has been made to incorporate corporate social responsibility into the Companies and Allied Matters Act, 2004. Directors are now required to include in their annual report, money given for charitable purposes.⁴⁸ Sanctions are available for defaulting directors.

⁴⁴ Campbell A., Stakeholders (1997). The Case In Favour. *Long Range Planning*, 30; pp. 446. See also Stoney C. & Winstanley D., (2001). Stakeholding: Confusion or Utopia? Mapping the Conceptual Terrain. *Journal of Management Studies*, 38; p. 608.

⁴⁵ Sullivan, D.P. & Conlon, D.E. (). Crisis and Transition in Corporate governance Paradigms: The Role of the Chancery Court of Delaware, *Law & Society Review*, 31; p. 713.

⁴⁶ Hall K.L. (1989). *The Magic Mirror, Law in American History*. New York: Oxford University Press, p. 9.

⁴⁷ Smith v. Barlow (1953) 98 A, 2d. 581.

⁴⁸ See CAMA, Schedule 5, Part III.

2.3.2.2 The Pluralist Model

The pluralist model supports the idea of multiple interests of stakeholders, rather than shareholder interest alone. It argues that the corporation should serve and accommodate wider stakeholder interests in order to make the corporation more efficient and more legitimate. Unlike the social entity theory that justifies stakeholder interests on the basis of moral value and fundamental human rights, the pluralistic model legitimizes stakeholder value in a more subtle way – more attuned to the traditional Anglo-American corporate governance mentality.⁴⁹

It suggests that corporate governance should not move away from ownership rights. Such rights should not be solely claimed by shareholders. Ownership rights should also be claimed by other stakeholders, particularly employees. Stakeholders who make firm specific investments and contributions and bear risks in the corporation should have residual claims and should participate in the corporate decision making to enhance corporate efficiency.⁵⁰

The pluralist model is often connected with the instrumental position in claiming wide stakeholder interests.⁵¹ Stakeholding is regarded as an effective means of achieving specific ends, rather than as an end itself. Most commonly, it is argued that stakeholding is instrumental in increasing efficiency, competition and profitability.⁵²

Freeman's⁵³ initiative on stakeholding management as a business strategy is also in the instrumental orientation. It is asserted that if corporations practice stakeholder

⁴⁹ Gamble A. & Kelly, G., op. cit.

⁵⁰ Steve Letza & Xiuping Sun, op. cit.

⁵¹ Campbell, A., op. cit.

⁵² Stoney C. & Winstanley D., op. cit. p. 608.

⁵³ Steve Letza & Xiuping Sun, Op. cit., p.52

management, their performance such as profitability, stability and growth will be more successful.

This theory may have influenced corporate law to make directors consider the interest of employees in the course of managing the company and that of creditors where the company is insolvent or nearing insolvency.⁵⁴

2.3.2.3 The Trusteeship Model

The trusteeship model adopts a realistic and descriptive perspective in viewing the current governing situation of publicly held corporation. Drawing from the Continental European conception of the corporation as a social institution with a corporate personality, Kay and Silberston⁵⁵ argue that a public corporation is not the creation of private contract and thus not owned by any individual. Ownership is by definition where the owner has exclusive rights of possession, use, gain and legal disposition of material object. Yet shareholders merely own their shares in a company and trade their shares with others in the stock market. They do not have the right to possess and use the assets of the company to make decision about the direction of the company and to transfer the assets of the company to others. The residual claims of the shareholders are determined by the company and if the company's performance does not satisfy the shareholders requirements, the shareholders are left with a single option of 'exit' rather than 'voice' as shareholders in general are in no way able to monitor the management effectively and neither are they interested in running corporate business. In this sense, the assumption that the corporation is owned by shareholders is in fact meaningless.

⁵⁴ CAMA, section 279(4); see also the case of *Linton v. Tilnet Pty Ltd* (1999) 17 ACLC 619.

⁵⁵ Kay J. & Silberston A. (1995). *Corporate Governance. National Institute Economic Review*, 84; pp. 84-97.

For Kay and Silberston, ownership rights are not important to business. Many public institutions such as museums, universities and libraries perform well without clear owners. Indeed, company law does not explicitly grant shareholders ownership rights because the corporation is regarded as an independent legal person separate from its members and shareholders are merely the ‘residual claimants’ of the corporation.⁵⁶ The company has its own assets, rights and duties and has its own will and capacity to act and is responsible for its own actions. Therefore, Kay and Silberston reject the idea that management are the agents of shareholders. Instead, they suggest that managers are trustees of the corporation.

The trusteeship model differs from the agency model in two ways. First, the fiduciary duty of the trustees is to sustain the corporation’s assets, including not only the shareholders’ wealth, but also broader stakeholders’ value such as the skills of employees, the expectations of customers and suppliers and the company’s reputation in the community. Second, managers have to balance the conflicting interests of current stakeholders and future stakeholders and to develop the company’s capacities in a long term perspective rather than focus on short term shareholder gains. To establish a trusteeship model, they ask for statutory changes in corporate governance, such as changing the current statutory duties of directors, ensuring the power of independent directors to nominate directors and select senior managers and appoint chief executive officers for a fixed four year term, etc.

This theory has so much influence on the Companies and Allied Matters Act. The Act does not make the director a trustee of the company simpliciter, but makes the director a trustee of the company’s moneys, properties and a trustee of its powers. But in the exercise

⁵⁶ Warren R. C., *op. cit.*, p. 18.

of their powers as such, they are to act honestly in the interest of the company and all the shareholders and not in their own sectional interest.⁵⁷

2.4 MANAGEMENT AND CONTROL OF A COMPANY

The International Dictionary of Management⁵⁸ defines management as “a group of people responsible for directing and running an organization”. According to **Robert Kreiter**⁵⁹ management is the process of working with and through others to achieve organizational objectives in a changing environment. Management may also be defined as that body of men who, in law, have formally assumed the duties of exercising domination over the corporate business and assets.⁶⁰

The Companies and Allied Matters Act⁶¹ recognizes and confers management powers on two main organs of the company, namely; the members in general meeting and the board of directors. Therefore, any other authority can only be derived from either of these two. For instance, the managing director, officers and other agents of a company such as the liquidator, receiver and any other person could possess managerial power through delegation from the board of directors and general meeting, respectively, or under some other circumstances as may be vested by Memorandum or the Articles of Association. A company may also, by writing under seal, empower any person as its attorney to, on its behalf; execute deeds either generally or in respect of any specified matter in any part of the world.⁶²

⁵⁷ CAMA, section 283(1).

⁵⁸ Hano Johannsen and G. Terry Page, (4th Ed.) London. Kogan Page Limited, 1975 at page 178.

⁵⁹ Robert Kreiter (1999). *Management* (7th ed.). USA. Houghton Mifflin Company, at page 5.

⁶⁰ Berle and Means, p. 220.

⁶¹ Cap C20 LFN, 2004.

⁶² There would be presumption of regularity in favour of any third party who deals with the company under such authority; and the exercise of such power by the person so appointed is binding on the company and have the same effect as it would have if it were under the company's seal - See sections 69 and 76 of CAMA.

Functionally, the board of directors manages the companies and takes policy decisions generally affecting the company whereas the members in general meeting elect the board of directors and decide its organic change. Individual officers are answerable to the board of directors, but the board as a collegiate is only answerable not to the shareholders as individual members but to the company as a whole. It is therefore for the constitutional document most specifically the Articles of Association to determine the distribution of powers between the general meeting and the board of directors.⁶³

The Act reserves for the shareholders some matters such as changes in the Memorandum and Articles of Association of the company;⁶⁴ alteration of the Articles;⁶⁵ alteration of the share capital;⁶⁶ reduction of share capital;⁶⁷ reduction of amount recommended by directors as dividends;⁶⁸ removal of directors⁶⁹ and voluntary winding up,⁷⁰ etc. Similarly, the Act exclusively reserves, inter alia, certain powers for the board of directors as follows: (i) amount to be declared as dividends,⁷¹ (ii) issuing of shares⁷² and (iii) convening of meetings⁷³ and appointment of company secretary.⁷⁴

Apart from the reserved powers, the law gives complete freedom to the corporations to distribute the decision-making powers of the company as they wish. Under such circumstances, the division between the board of directors, general meeting or their delegates is dependent on the interpretation of the Articles. This also implies that such

⁶³ Whatever be the provision of the Act and Articles, it is generally accepted that the management powers of the company are vested in the board of directors. Hence, section 244 CAMA defines directors as persons duly appointed by the company to direct and manage the business of the company.

⁶⁴ Section 46(1) CAMA.

⁶⁵ Section 48 CAMA.

⁶⁶ Section 100 CAMA.

⁶⁷ Section 106 CAMA.

⁶⁸ S. 379(3) CAMA. The general meeting has power only to decrease but not increase the amount recommended by the directors as dividend.

⁶⁹ Section 262 CAMA.

⁷⁰ Section 457, CAMA. This is so for the obvious reason that the members in general meeting are those that really have pecuniary interest in a company as the success of such company enhances their earning whereas the directors have nothing or little to lose in event of mismanagement except where they are also members of the company.

⁷¹ Section 379(2) CAMA.

⁷² Section 124 CAMA.

⁷³ Sections 211, 213 and 215 CAMA.

⁷⁴ Section 296 CAMA.

allocation of powers can be varied by the alteration of the Articles. Section 63 (2) of the Act recognizes that the matter of distribution of powers within the company is a contractual one, and that it is open to the company to adopt whatever form of distribution of powers it pleases. The law however holds the management to certain basic standards of conduct, to wit; (i) a decent amount of attention to business; (ii) fidelity to the interests of the company; and (iii) reasonable business prudence.⁷⁵

2.5 SUPERVISORY POWER OF THE GENERAL MEETING OVER THE BOARD OF DIRECTORS

As previously mentioned, directors are the ultimate managers of the company. Section 63 (3) of the Companies and Allied Matters Act⁷⁶ gives the directors all the powers to manage the affairs of the company except those expressly reserved to be exercised by the members in general meeting. The respective powers of the members in general meeting and the board of directors are determinable by the company's articles of association subject however to the provisions of the Act.⁷⁷

Thus, where the general management of the company is vested in the directors, the shareholders have no powers by ordinary resolution to give directions to the board on how the company's affairs are to be managed, nor can they overrule any decision come to by the directors in the conduct of its business, nor to usurp its management prerogatives. This applies even as regards matters not specifically delegated to the directors provided they are not expressly reserved for a general meeting by the Act or the articles. Furthermore, directors, unless as otherwise provided by the articles, are neither answerable nor accountable to members in general meeting so long as they acted in good faith and with

⁷⁵ Berle and Means, op cit. p. 221

⁷⁶ Cap. C20, LFN, 2004

⁷⁷ See section 63(2) CAMA

due diligence.⁷⁸ The rule equally applies where the board has validly delegated its powers.⁷⁹

Section 63(4) of the Act⁸⁰ provides as follows:

Unless the articles shall otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the articles, shall not be bound to obey the directions or instructions of the members in general meeting: provided that the directors acted in good faith and with due diligence.

This provision is, indeed, intended to re-enact the principle in the English case of **Automatic Self-Cleansing Filter Syndicated Co. v. Cunninghame**,⁸¹ subject to the statutory “good faith and due diligence” clause. In essence, what the phrase “unless the articles shall otherwise provide . . .” implies is that the shareholders could reserve to themselves the power to instruct or direct the board in respect of the business of the company. Where such reservation has been made, it is the opinion of this researcher that the power so reserved shall apply even to matters in respect of which the Act or the articles have empowered the directors to act.

Although the general meeting is not expressly saddled with management powers per se; they perform some supervisory role over the exercise of management powers by the board of directors. They have residual and ultimate powers to alter the articles to curtail⁸² or even remove the directors and appoint new ones, either at will or where the directors fail to exercise the powers conferred on them in the conduct of the affairs of the company owing, perhaps, to disagreement, deadlock⁸³ or inability to meet. They also have the powers to institute legal proceedings in the name and on behalf of the company if the

⁷⁸ Sections 63(4) and 282 CAMA.

⁷⁹ *Ukphilla Cement Co. Ltd v. Igiekhume* (1979)1 FCA 64

⁸⁰ *Id*

⁸¹ [1906] 2 Ch. 34 (C.A.)

⁸² Such alteration must be bonafide and in the best interest of the company. It should also be noted however that the power of the members to alter the Articles is not retrospective of the prior act of the board of directors which would have been valid if that alteration had not been made – section 63(6) CAMA.

⁸³ Section 63(5)(a) CAMA.

board of directors refuses or neglects to do so;⁸⁴ to ratify or confirm any action taken by the board of directors;⁸⁵ make recommendations to the board of directors regarding action or actions to be taken by the board.⁸⁶ In essence, the defaulting powers of the shareholders are meant to place some limits on the powers of the board. The fact that directors may, sometimes, abuse their powers renders the existence of such control desirable. This is for obvious reason that the members in the general meeting are those that really have pecuniary interest in a company as the success of such company enhances their earning whereas the directors have nothing or little to lose in the event of management except where they are also members of the company.

The supervisory role of the general meeting over the board of directors has its origin in Article 80 Table A to 1948 English Companies Act which was clearly re-enacted under Article 70 Table A of 1985 English Companies Act. The Article 80 Table A to the 1948 Act allowed the general meeting to interfere with the exercise of management powers by ordinary resolution. However, this generated a lot of controversies for fear that decisions by ordinary resolution alone might negate the very important issue of minority protection and the concept of corporate governance. The controversies therefore led to a clearer provision in Article 70 to 1985 English Act which amended the earlier provision only to the extent that the general meeting could interfere by special resolution.

In Nigeria, Article 80 of the English Companies Act, 1948 was incorporated verbatim as Article 80 of the Companies Act, 1968. Article 80 of Table A First Schedule to the Act which is in pair material with Article 80 of the English Companies Act 1948 provides:

The business of company shall be managed by the directors,
who may pay all expenses incurred in promoting and registering

⁸⁴ See section 63(5)(b) Companies and Allied Matters Act and the case of *Marshall's Valve Gear Company v. Manning Wardle and Company* (1909) 1 CH 267; 100 L.T. 65

⁸⁵ See section 63(5) (c) CAMA. See also *Bamford v. Bamford* (1970) Ch.d 135 CA

⁸⁶ See section 63(5)(d) CAMA.

the company, and may exercise all such powers of the company, as are not by the Decree or by these regulations required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Decree and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

As a result of the above provisions, the issue as to who controls corporate powers became once again topical.⁸⁷ Article 80 was subject to two conflicting interpretations which may be referred to as the minority view and the majority view, respectively. It is the majority view that under an article in line with Table A, the general meeting cannot give directions on how the company's affairs are to be managed, nor can they over-rule any decision taken by the directors in the conduct of the business of the company. Thus the shareholders were seen to have no executive authority whatsoever. The minority view, on the other hand, is that the directors are to manage but subject to the constraints of the articles.⁸⁸

The Companies and Allied Matters Act, 1990 was later enacted in Nigeria.⁸⁹ Fundamentally, what the 1990 Act has done is to codify the relevant common law principles arising out of case law and also the relevant articles in Table A allowing each organ independent rights to exercise its powers unless some intervention becomes necessary in the interest of the company.⁹⁰

The supervisory powers of the general meeting are expressly captured in section 63 (5) of the Act. They are the powers to:

⁸⁷ See Mackenzie J. (1983). Who Controls the Company? - The Interpretation of Table A. , 99-102; Gower, L.C.B. (1969). The Principles of Modern Company Law (2nd ed.). London. Stevens and Son, and Sullivan G.R. (1977). The Relationship between the Board and the General Meeting in Limited Companies. *L.Q.R.* 93; 569 at P. 571; Colelberg G.D. (1948). Article 80 of Table A of the Companies Act. *M.L.R.* Vol. 33, 177, 172-85.

⁸⁸ This view received confirmation in the case of Marshall's Valve Gear Co. Ltd v. Manning, Wardle & Co. Ltd (1909) Inc. 267 – where it was held, per Neville J. that on the proper construction of the articles the majority of shareholders had the right to control the action of the directors.

⁸⁹ The Act which towed the line of Article 70 of the English Companies Act, 1985, was codified in 2004 as Cap. C20, LFN, 2004.

⁹⁰ See sections 63 & 64 CAMA.

- (a) act in any matter if the members of the board of directors are disqualified or are unable to act because of deadlock on the board or otherwise;
- (b) institute legal proceedings in the name and on behalf of the company, if the board of directors refuses or neglects to do so;
- (c) ratify or confirm any action taken by the board of directors; or
- (d) make recommendations to the board of directors regarding actions to be taken by the board.

The default powers of the general meeting over management of the company as encapsulated in section 63 (5) of the Act therefore become exercisable only where the board cannot or will not for any or some reasons exercise the powers vested in them. Thus, in **Danish Mercantile Co. v. Beaumont**,⁹¹ the court held that if the directors cannot or will not start legal proceedings to remedy a corporate wrong, the general meeting can validly resolve to do so. Similarly, in **Barrons v. Porter**,⁹² the two directors of the company were not on speaking terms so that effective board meetings could not be held to elect additional directors. The Court, on the ground of deadlock, held that the power of the board of directors to appoint additional directors reverted to the general meeting.⁹³ Alas, the default powers of the general meeting are so wide and expansive so that it is capable of causing unprecedented and nascent situations justifying unnecessary intervention of the members in managerial affairs reserved for the board of directors; hence **Megarry J in Re Argentum Reductions (UK) Ltd**⁹⁴ on a similar English provision, opined that “there are deep waters here”.

⁹¹ (1951) Ch.680 CA.

⁹² (1914) 1 Ch. 895.

⁹³ See further *Foster v. Foster*, (1916) 3 Ch. 532 where some directors purported to participate in a resolution removing another director from office as a result of fractionalization on the board and among the membership but contrary to provisions of the company’s Articles of Association which precluded directors from voting on resolutions to remove fellow directors from office. The court, on the ground of disqualification and deadlock, held that competence in the matter had reverted to the general meeting.

⁹⁴ (1975) 1 All E.R. 608.

2.6 SUPERVISORY POWER OVER CONTROL OF COMPANY'S LITIGATION

The general rule of corporate sovereignty and democracy is as laid down in the English case of **Foss v. Harbottle**.⁹⁵ The rule which arose from the decision of the court in that case is that the decision to litigate for any wrong done to a company or for any irregularity in the management of its internal affairs, is that of the company itself; and where the actionable act is capable of confirmation by a simple majority of its members, the court will not interfere at the suit of a minority of its members for that would mean interfering in the internal affairs of the company— the rule is binding on trade unions.⁹⁶ In a pertinent formulation of this policy, **Lord Eldon** observed: “this court is not required on every occasion to take the management of every playhouse and brewhouse in the kingdom”.⁹⁷

The rule is said to be based on the following perceptions. Firstly, it prevents or avoids multiplicity of actions over one similar incidence on same set of facts. If, for instance, each and every shareholder were allowed to sue over a single wrong done to the company, there could be as many actions as there are shareholders and that would probably expose the company to multiplicity of suits, leading to enormous wastage of time and money. Secondly, it preserves the principle of majority rule of powers of ratification by the members in general meeting of wrongful acts of the directors. It is argued that if the individual shareholders could sue, the powers of the general meeting to ratify the wrongful

⁹⁵ (1843) 2 Hare 461. In this case, two members alleged that the directors of the company had defrauded the company by selling their (directors) own landed properties to the company. They therefore sought an order to compel the director to make good the loss suffered by the company. The court held that the action should fail. That the wrong was against the company and so the company is the proper plaintiff.

⁹⁶ *Elufioye & 9 ors vs. Halilu & 17ors* (1993) 6 NWLR (Pt 301) 570. Majority is determined by the number of shares a person holds. In contrast to the provision of section 22 (4) CAMA where two or more persons jointly holding shares in a company are treated as a single member just for the purpose of determining the required maximum number of members. Section 116 CAMA provides to the effect that in voting the rule is one share, one vote. So if a company of one million share capital has, for instance, ten shareholders one of whom has 991 shares and the rest of the shareholders have one share each, the shareholder with 991 shares would be the majority over the remaining nine shareholders. Therefore, the universal concept of majority rule extends to company law but in a special sense - See Emeka Chianu (2012). *Company Law*. Abuja. Pan Press. 2012, p. 554.

⁹⁷ *Carlen v. Drury* (1812) 1 Vew & B 154, 148.

acts of the directors would have been meaningless. Finally, it helps to properly identify the company as its own plaintiff and better protects defendant's rights of claim in a corporate litigation. It is a logical consequence of separate legal personality of a company that since it lies within the prerogative of the company that suffers the wrong; it would also be the one who institutes legal action or ratify the wrongful conduct. The defendant's rights to counter-claim, set-off, etc are better preserved where the company sues directly as the plaintiff. This principle in Foss's case is now preserved in section 299 of the Act.⁹⁸

However, a strict application of or adherence to this rule may be a shield for directors who are themselves the management of the company to perpetrate fraud, because directors who are supposed to sue may also be the wrongdoers so that injustices to the company and minority shareholders may never be redressed. A number of exceptions to the general rule were therefore developed by the common law and these are now enshrined in section 300 of the Act to the effect that a corporate litigation may be brought by a member for declaration or an injunction to restrain the company from:

- a. entering into any transaction which is illegal or ultra vires;⁹⁹
- b. purporting to do by ordinary resolution any act which by its constitution or the Act requires to be done by special resolution.¹⁰⁰
- c. any act or omission affecting the applicant's individual right as a member;¹⁰¹

⁹⁸ CAMA.

⁹⁹ Hoole v. Great Western Rly Co. (1867) L.R. 3 Ch. App. 262. The majority cannot ratify illegal acts or themselves act beyond the company itself – Parke v. Daily News (1961) 1 WLR 493. The residual power of the shareholders to ratify the acts of directors as provided in section 63(5)(c) CAMA does not extend to ratification of illegal acts but only the ultra vires act of directors which are within the powers of the company – see also MacDougall v. Gardiner (1875) 1 Ch. D 13. By s. 39(1),(2) and (4) CAMA, ultra vires acts of a company can be challenged by any member or debenture holder secured by floating charge in an action brought pursuant to ss. 300- 313 CAMA.

¹⁰⁰ Thus in Edwards v. Hallwell (1950) W.N. 537, the rules of a union provide that a member's contribution can only be increased by 2/3 majority. This was increased by a simple majority. The court held that a member had a right to sue.

¹⁰¹ See Edokpolo & Co. Ltd v. Semo-Edo Wire Ind. Ltd (1984) NSCC 553; Edwards v. Hallwell (supra) and also Pender v. Lushington (1877) 6 Ch.D 70; 46 I.J. Ch. 317- where a shareholder brought an action for an injunction to restrain the directors for rejection of his own vote and those of all others who had voted for being bad. The court held that the plaintiffs were entitled to injunction.

- d. committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;¹⁰²
- e. where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders;¹⁰³ and
- f. where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty.¹⁰⁴

Three theories emerged as to the power of the general meeting to control corporate litigation. The theories are the management theory, the residual theory and the parallel theory.

The management theory is to the effect that the control of the general meeting over the company's litigation is much the same as over the general management. Consequently, the general meeting can only interfere through a special resolution.¹⁰⁵ The parallel theory, on the other hand, is that both the general meeting and the directors can exercise power over corporate litigation. Therefore, the general meeting, by majority vote, can bring an action on behalf of the company in the same way as the board of directors. This was illustrated with the case of **Marshall Valve Gear Co. v. Manning Wardle & Co. Ltd.**¹⁰⁶ Lastly, the residual theory postulates since the ultimate and residual powers of the company lie in the general meeting, and the members can bring an action where the board refuses to sue. However, the supervisory power over litigation by the general meeting would only arise

¹⁰² See section 63 (3)(b) CAMA and also the cases of *Menier v. Hooper's Telegraph Works* (1874) L.R. 9 ch. App. 350; and *East Pant Du Lead Mining v. Merry weather* (1864) 2 H & M 254.

¹⁰³ For instance, where the directors have exceeded their borrowing limits and have mortgaged the prime asset of the company, and the loan may not be properly managed, and if not stopped, the transaction would have been consummated and the ultra vires rule can no longer be invoked by virtue of s. 39(3) CAMA, which ordinarily would not have been validly set aside timely at executory stage under s. 39(5) CAMA.

¹⁰⁴ See *Daniels v. Daniels* (1978) 2 W.L.R. 73. A close look at these exceptions shows that five of them are unconnected with the general rule in section 299 of the Act but based purely and wholly on common sense. In section 300 (a),(b), (d) and (f) of the Act, the wrongful act is done not so much to the company as by it; and so if the majority acts ultra vires or illegally, or alter the objects by ordinary resolution, or oppress the minority, or breach their duty, it is the company for purpose and not for another. One cannot say that the majority constitutes the company for one purpose and not for another.

¹⁰⁵ As demonstrated in *Shaw's case* (supra).

¹⁰⁶ Supra.

where the board of directors has defaulted in exercising their powers under the Articles owing to disagreement, deadlock or inability to meet. Marshall's case can also be justified practically on this ground that the board had refused to exercise their power to initiate litigation so that it becomes legitimate for the general meeting to do so.¹⁰⁷

Again, the application of a particular theory would depend on who is in control in respect of the particular misconduct complained against. If those in control are the directors and they perpetrate fraud, the general meeting can institute litigation on behalf of the company in accordance with the exceptions to **Foss v. Harbottle**.¹⁰⁸ However, where the wrong complained of is by some members of the general meeting, the board may take action. This appears to accord with the parallel power theory. By virtue of section 301 (3) of the Act, the member is entitled to be indemnified by the company against all costs reasonably incurred in the course of instituting the action.¹⁰⁹

2.7 THE BENEFITS OF THE SEPARATION OF OWNERSHIP AND MANAGEMENT

Separation of ownership and management in corporate governance involves placing the management of the firm under the responsibility of professionals who are not its owners. This delegation of management responsibilities may be due to various reasons ranging from professional managerial skills, ease of performance appraisals, capital utilization and ensuring a system of corporate checks and balances in place.

The growth of a company comes with it the demand for different skills to manage the operations of the company, meaning that the owners of a company may not entirely have

¹⁰⁷ See sections 63(5)(b) and 303(2) CAMA. Therefore, on default by the board to initiate an action, the general meeting can by ordinary resolution institute such an action under the above provision.

¹⁰⁸ (Supra). The minorities may also be able to maintain an action in such situation.

¹⁰⁹ Note however where a member institutes a personal action representative action on behalf of himself and other affected members, he shall not be entitled to any damages but may only be entitled to an order either of injunction or declaration to restrain the company and/or the directors from doing a particular act. See s.301 (1) and (2) CAMA.

the necessary skills and experience needed for certain managerial roles. Creating a management team separate from the ownership therefore enables the company to be run by professionals who have diverse skills such as in marketing, corporate financing, public relations, among others.

Secondly, separation of ownership and management leads to performance appraisals as an essential part of good corporate governance; and in turn enables managers to evaluate the company and to point out areas of improvement. It could be imagined how complex it would be to evaluate performance where there is a lack of separation of ownership and management. Separation of ownership and management therefore makes it a lot easier for the board and those in management to be evaluated objectively; and owners are able to freely deal with the chief executive officer and other senior managers, even after the appraisals.

Thirdly, separation of ownership and control helps for capital utilization. By this it is meant the arrangements that determine the way in which resources and assets are managed in a company. Separating personal assets and liabilities from the business assets and liabilities may prove to be difficult for company owners. It is necessary therefore for managers to come in to devise ways in which business assets are managed to generate the highest profits for all the shareholders.

Finally, separation of managers from owners in a firm ensures that a system of corporate checks and balances is in place. Managers act as a buffer between the company and stakeholders such that they can alleviate negative impacts of stakeholder activities and avoid hitches in public relations. Managers are well suited to put in place strategies that will lessen losses to the rest of the stakeholders as a result of the actions of another stakeholder.

2.8 SHAREHOLDERS' RIGHTS AND NATURE OF INTEREST IN A COMPANY

A shareholder is a person, individual or corporation, that legally owns any part of a share or stock in a public or private corporation.¹¹⁰ A shareholder in the context of a company may be used interchangeably with a member, although a slight difference exists between the two terms in the sense that in a company limited by shares, there can be no membership except by the medium of shareholding whereas in a company limited by guarantee, there can only be members but not shareholder. Thus, all the shareholders in a company are members of the company, but not all members are shareholders.

A member of a company is one who has subscribed to the Memorandum and Articles of Association, or who has been issued shares in the company, and his name is registered in the company's register of members.¹¹¹ By this definition, a person may become a member of a company by subscribing to the Memorandum of Association of the company or by agreeing in writing to become a member of the company.¹¹² Other persons may from time to time become members.¹¹³ A member who acquires shares of a company by whatever means must have his name entered on the register of members before he enjoys membership benefits.¹¹⁴ By virtue of section 18 of the Act,¹¹⁵ at least two persons must subscribe to the memorandum whether the company be a private or public company.¹¹⁶

¹¹⁰ He is a part owner of a company and is entitled to take part in making decisions for the running of the company.

¹¹¹ See *Odumody & Teil Enterprises (Nig) Ltd v. Mohammed & Ors* (1973) NCLR 452.

¹¹² See section 79 CAMA.

¹¹³ Membership can also be by acquisition of shares through any of the following means: (i) subscription, (ii) allotment, (iii) transmission, and (iv) transfer – see sections 79, 124, 151 and 155 CAMA. In section 46(2), member is defined in relation to the provision contained therein to include 'any person financially interested in the company'. See also sections 315 and 302 for more on definition of member.

¹¹⁴ Agreement per se does not make a person member of a company but only bestows in him some contractual rights to become a shareholder – See *Odumody v. Mohammed* (1973) NCLR 452 at p. 460 and *Sparks Electric (Nig) Ltd v. Ponmile* (1986) 2 NWLR (pt. 23) 516 at p.523. However, only subscribers to the Memorandum and Articles of Association are automatic members whose names must be registered, others would take steps to get fully registered- see section 79(1) & (2) CAMA, *Ezeonwu v. Onyechi* (1996) 2 SCNJ 250.

¹¹⁵CAMA.

¹¹⁶ The memorandum shall be signed by each subscriber in the presence of at least one witness who shall attest the signature – section 27 (5) CAMA.

A person who is eligible¹¹⁷ to be a member of a Nigerian company limited by shares must own at least one share¹¹⁸ attracting at least one vote¹¹⁹ and in the case of a company limited by guarantee, possess some guaranteed voting interest.¹²⁰ Membership benefits basically accrue from the rights on the terms of issue as in the company's Articles of Association.¹²¹ When a person becomes a member of a company, he or she thereby relinquishes all proprietary and other interests in the monetary or other considerations he or she has given by his or her shares and which have become wholly vested in the company. In return he or she is granted some rights.

The classic definition of a share by **Farewell J.** in the case of **Borland's Trustee v. Steel Brothers & Coy Ltd**¹²² sheds some light on its nature as follows:

A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders.

Shareholders of a company are entitled to certain rights, benefits and privileges¹²³ depending on the class of shares owned. Section 144 of the Act¹²⁴ provides that the rights and liabilities attaching to the shares of a company depend on the terms of issue and the company's articles. These rights and benefits include the followings:

- i. Right to copy of Memorandum and Articles of Association;¹²⁵
- ii. Right to receive notice of meeting for alteration of business/objection;¹²⁶

¹¹⁷ Certain persons are disqualified from being members of a companies in Nigeria – see sections 20 and 80 of CAMA. It is also an offence to impersonate a member of a company – see section 82 of CAMA.

¹¹⁸ See section 79(3) CAMA.

¹¹⁹ See section 116 CAMA. Share without voting right has been abolished in Nigeria.

¹²⁰ By section 124 of CAMA, the power to allot shares is vested in the company which may however, delegate it to the directors, subject to any conditions or directions imposed in the Articles or from time to time by the company in general meeting.

¹²¹ See section 114 CAMA.

¹²² (1901) 1 CH 279; 17T.L.R. 45.

¹²³ See *Kotoye v Saraki* (1994) 7 NWLR (Pt. 357) 414.

¹²⁴ CAMA.

¹²⁵ S.42 CAMA.

¹²⁶ S.46 CAMA.

- iii. Right to receive yearly financial statements;¹²⁷
- iv. Right to obtain copy of the company's last financial statements;¹²⁸
- v. Right to attend and vote in company's meetings;¹²⁹
- vi. Entitlement to notice of meeting;¹³⁰
- vii. Right to transfer shares as a personal property;¹³¹
- viii. Right to stop alteration of object;¹³²
- ix. Right to receive dividend once it is declared by the board;¹³³
- x. Right to sue for dividends declared by directors;¹³⁴
- xi. Right to take up minority protection actions in the company;¹³⁵
- xii. Right to participate in appointment and removal of directors;¹³⁶
- xiii. Right to demand poll and appoint proxy in company meetings;¹³⁷
- xiv. Right to requisition extra –ordinary general meeting;¹³⁸
- xv. Right to remain a member with no extra liability if shares are fully paid;¹³⁹
and
- xvi. Right to remain a member unless restructured out and shares compulsorily
acquired.¹⁴⁰

¹²⁷ S.344 CAMA.

¹²⁸ S.349 CAMA.

¹²⁹ Ss. 81, 227 and 114(b) CAMA. A preference shareholder is entitled to more than one vote- ss. 143 and 116(3) CAMA.

¹³⁰ Ss.95(2), 219, 220, 222 and 228; see ss. 95(5) and 221 for sanctions in case of default.

¹³¹ S.115 CAMA.

¹³² S.46(2) CAMA.

¹³³ S.379 CAMA.

¹³⁴ S.385 CAMA.

¹³⁵ Ss. 300, 302 and 303 CAMA.

¹³⁶ Ss.247 and 248 CAMA.

¹³⁷ Ss. 225 and 230 CAMA.

¹³⁸ S.215 CAMA.

¹³⁹ S.49 CAMA.

¹⁴⁰ It should be noted here that the right of a member of a company to share in the profits and surplus assets, if any, of the company does not apply to companies limited by guarantee. This is by virtue of section 26(9) CAMA which provides that the company's property which remains after the discharge of all its debts and liabilities are to be transferred "to some other company limited by guarantee having objects similar to the objects of the company or applied to some charitable object". The members are however allowed to determine such other company or charity prior to the dissolution of the company. See Adeogun A. A. (1992). Membership of a Company" In: Akanki E.O. (ed.) Essays on Company Law. Lagos. University of Lagos Press, p.58 at 74.

These rights are either conferred by statute or by the articles. Rights conferred by the articles can only be altered and determined in accordance with the provisions of the articles, whereas rights conferred by statute cannot be altered by the board of directors or members in general meeting. These principles were brilliantly restated by **Perkins, J.**, in the Indian case of **Ohio Ins. Co. v. Nunnemeher**¹⁴¹ where he said:

A corporation is a creature existing, not by contract; but, in this country, is created or authorized by statute; and its rights, and even mode of action, may be, and generally are, defined and marked out by statute; and when they are, they cannot be changed, even by the contracts of the corporators.

Thus a shareholder has only the right to have all the assets administered by the directors in accordance with the constitution of the company¹⁴² and he has such rights as the Memorandum and Articles give him and nothing more.¹⁴³ The Articles upon registration shall bear the same stamp as if they were contained in a deed.¹⁴⁴ The effect is that subject to the provisions of the Act, the Memorandum and Articles of Association, when registered, shall constitute a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the Memorandum and Articles, as altered from time to time in so far as they relate to the company, members, or officers as such.¹⁴⁵ This provision clearly establishes three main points.

Firstly, the Memorandum and Articles constitute a contract between the company and each member.¹⁴⁶ Thus a member can sue the company to compel it to allow him to vote at a meeting of members¹⁴⁷ or to pay him the dividend on his share¹⁴⁸ or to enforce any other

¹⁴¹ (1860) 15 Ind. 294 at P.295.

¹⁴² Hood v. Barrs V.I.R.C (1946) 1 All E.R. 768 at p. 775.

¹⁴³ Short Treasury Commissioner (1948) 2 All E.R. 509 at p. 512. Both authorities cited by Ayua, op.cit pg 11.

¹⁴⁴ S. 34(4) CAMA. See also section 27(6) CAMA which provides that the memorandum shall be stamped as a deed.

¹⁴⁵ See section 41(1) CAMA.

¹⁴⁶ See Hickman v. Kent or Romney Marsh Sheep breeders Association (1915) 1 Ch. 881 , per Ashbury, J.

¹⁴⁷ Pender v. Lushington (1877) 6 Ch. D. 70.

¹⁴⁸ Wood v. Odessa Waterworks Co. (1889) 42 Ch. D. 636.

right as spelt out in the Memorandum and Articles. Conversely, too, the members are contractually bound to the company. This contract between the company and each member has been called a contract of “the most sacred character” in the sense that the shareholder advances his money in reliance upon it.¹⁴⁹ And as **Buckley L. J.**¹⁵⁰ said, “the purpose of the Memorandum and Articles is to define the position of the shareholder as shareholder, not to bind in him in his capacity as an individual”.¹⁵¹

Secondly, the contract under section 41 of the Act binds the members inter se. In **Rayfield v. Hands**,¹⁵² where the Articles provided that members wishing to transfer their shares must inform the directors of their intention who will take the shares equally between them at a fair value; it was held that the directors were bound to take the shares as the Articles constituted a contract between Ray field and the directors not as directors but as members of the company.

Thirdly, the contractual relationship arising out of the Memorandum and Articles relates only to the shareholder’s rights and duties as member and not in any other capacity.¹⁵³ Any right given to a person such as a director or solicitor is an outsider right.

While a shareholder cannot rely on an outsider right, he can nevertheless sue the company to observe the provisions of its Articles. Thus, in **Quin & Axtens v. Salmon**,¹⁵⁴ the Article gave Salmon, a director, power of veto. The company passed some resolutions and proposed to implement them in defiance of Salmon’s veto. He sued the company as a member to observe the provisions of the Articles. He succeeded and the company was restrained from acting in violation of its Articles. Similarly, although the Articles do not

¹⁴⁹ Section 41(2) CAMA provides that all money payable by member of the company under the Memorandum or Articles shall be a debt due from him to the company and shall be of the nature of a specialty debt.

¹⁵⁰ *Bisgood v. Hendersenisi Transvaal Estate Ltd* (1908) 1 Ch. 743 at p. 759.

¹⁵¹ See also *Iyle and Scott Ltd v. Scott’s Trustees* (1759) A.C. 763.

¹⁵² (1960) Ch. 1.

¹⁵³ See *Eley v. Positive Life Assurance Co* (1876) 1 Ex. D. 88, C.A. See also *Beattie v. Beattie Ltd* (1938) Ch. 708.

¹⁵⁴ (1909) 1 A.C. 442.

constitute a contract between the company and the members except as members, nevertheless a contract may be inferred from the conduct of the parties particularly where there has been part performance.¹⁵⁵

Similarly, where the Articles provide for the removal of the directors at a general meeting and a director is so removed the company will not be liable for breach of contract if the director has no separate contract of service with the company or if there is one which does not stipulate the duration of the appointment. It therefore means that a person can now exercise an outsider right which relates to the appointment or removal of a director or officer of a company.¹⁵⁶ But where a company dismisses a director in pursuance of the powers conferred by the Articles in violation of the contract of service which makes provisions for the determination of the appointment, such a dismissal will amount to a breach of contract for which the company will be liable in damages.¹⁵⁷ Thus, the Supreme Court of Nigeria in the case of **Longe v. First Bank of Nig. Plc**,¹⁵⁸ nullified the removal of the appellant as director of the respondent bank and awarded damages for failure of the board of directors of the respondent's to serve on the appellant notice of directors meeting in compliance with the mandatory procedural requirements as stipulated in section 266 of the Act.¹⁵⁹ In that case, the appellant who was appointed an executive director and subsequently elevated to the office of the Managing director by the Board of Directors pursuant to the power conferred on the Board under Article 105 of the Articles of Association of the Respondent bank, irregularly granted credit facilities to a customer and

¹⁵⁵ See *Ex Parte Beckwith* (1898) 1 Ch. 324 (New British Iron Co.) where the articles required the directors to have a share qualification and a remuneration of #1,000.00 per annum. The directors took office on the basis of the articles and also became members as well. There was no separate contract between them and the company and they never paid any salary before the company went into liquidation. In upholding their claim to salary, the court per Wright, J., held: "Articles do not by themselves create a contract between the company and the directors but where on the footing of the articles of association the directors are employed by company and accept office, the terms of the articles are embodied in and formed part of the contract between the company and the directors".

¹⁵⁶ Section 41(3) CAMA See also the case of *Read v. Astoria Garage (Streatham) Ltd* (1952) Ch. 637.

¹⁵⁷ *Shindler v. Northern Raincoat Co. Ltd* (1906) 2 All E.R. 239.

¹⁵⁸ (2010) 6 NWLR (Pt. 1189) 1 SC 23; (2010) All FWLR (Part 525) 258.

¹⁵⁹ CAMA.

therefore subsequently suspended from office by the board of directors pending his recovery of the money. At another meeting of the respondent's board of directors, the appellant's appointment as the managing director of the respondent bank was eventually "revoked". The appellant was dissatisfied with the decision of the respondent and instituted an action before the Federal High Court Lagos against the respondent seeking to nullify his removal as director on the ground that, he was not served any notice of the meeting at which the decision was taken. Both the trial court and the Court of Appeal dismissed the appellant's claims and appeal, respectively. But the Supreme Court allowed the appeal and held that the office of the appellant as both a director and subsequently a managing director of the respondent bank is regulated by a statute, to wit, the Companies and Allied Matters Act, and therefore the removal of the appellant was not done in accordance with the law.

A company may by special resolution alter or add to its Articles and such alteration or addition shall be as valid as if originally contained therein and may by special resolution be subject to alteration.¹⁶⁰ In as much as the company cannot be restrained from altering its Articles, it will be liable for breach of contract if there is a separate contract between it and the injured party and the alteration results into a breach of contract.¹⁶¹

According to section 41(4) of the Act, in an action to enforce any obligation owed under the Memorandum or the Articles to him and any other member or officer, such member, or officer, may, if any other officer is affected by the alleged breach of such obligation with his consent, sue in a representative capacity, on behalf of himself and all other members or officers who may be affected.

¹⁶⁰ Section 48 CAMA.

¹⁶¹ *Punt v. Symons Ltd* (1903) 2 Ch. 506; *Southern Foundris Ltd v. Shirtlaw* (1940) 2 All E.R. 445.

From the discussion so far, it would appear that the nature of shareholder's rights in the company is only contractual. A shareholder quite apart from having rights against the company also has rights in the company. According to **Ayua**,¹⁶² he indeed has an interest in it. It is the rights he has in and against the company that distinguish him from a debenture holder who has rights only against the company. Hence the rights of shareholders include powers of control in the widest sense of an entitlement to participate, by voting, in the management of the company through the appointment and removal of directors and other important decisions of company in general meeting.¹⁶³

The liability of a member, on the other hand, has two phases. The first phase relates to the company as a going concern, that is, before the process of winding up sets in. In this case, his liability is as to the contribution of the balance, if any, of the amount payable in respect of the shares held by him in accordance with the terms of the agreement under which he acquired the shares. This will arise by way of a call validly made by the company otherwise the shares would be forfeited to the company and his membership is lost.

The second phase arises in the event of a company being wound up and here the liability is only as to the amount, if any, unpaid on the shares which he holds either as a present or past member. Again, where the member has paid in full on becoming a member, his liability as a contributory is virtually nil.¹⁶⁴

The liability of members as outlined here hinges on the agreement under which a person becomes a member and his liability cannot be increased unless with his consent.¹⁶⁵

¹⁶² Op.cit, p. 18.

¹⁶³ In fact, the acts of the members in general meeting are those of the company's.

¹⁶⁴ Adeogun A. A. op.cit . This exemption from any liability that may exist despite having fully paid for the subscribed shares does not apply to an unlimited company. In the case of a company limited by guarantee, the liability is the amount undertaken to be contributed by the member to the assets of the company in the event of its being wound up.

¹⁶⁵ See section 49 CAMA.

2.9 CLASSIFICATION AND ENFORCEMENT OF SHAREHOLDERS' RIGHTS

The legal rights of shareholders under the Companies and Allied Matters Act may be broadly categorized into four groups, namely; economic rights, control rights, information rights, and litigation rights. Each of these rights will now be examined as follows.

2.9.1 Economic Rights

Shareholders invest in companies primarily for economic gains. There are two main ways in which shareholders can profit from a company; by receiving distributions of the company's profits and by selling all or part of their interest in the company. These methods correspond with the two main economic rights of the shareholder; namely, the right to receive dividends once it is declared by the board¹⁶⁶ and the right to sell shares as personal property.¹⁶⁷ Shareholders are also entitled to the net proceeds of the company upon dissolution.¹⁶⁸

However, it should be noted that the economic rights of the shareholder does not apply to companies limited by guarantee. This is by virtue of section 26(9) of the Act¹⁶⁹ which provides that the company's property which remains after the discharge of all its debts and liabilities are to be transferred "to some other company limited by guarantee having objects similar to the objects of the company or applied to some charitable object".

One of the most important aspects of corporate share ownership is the payment of dividends.¹⁷⁰ Section 567 of the Act defines dividend to mean a proportion of the distributed profits of the company which may be fixed annual percentage, as in the case of

¹⁶⁶ Section 379 CAMA.

¹⁶⁷ Section 115 CAMA.

¹⁶⁸ Sections 480 & 518

¹⁶⁹ CAMA.

¹⁷⁰ A distribution which a company may make to its members out of its profits.

preference shares, or it may be variable according to the prosperity or other circumstances of, the company, as in the case of equity shares. Similarly, the Supreme Court of Nigeria in the case of **Kotoye v. Saraki**¹⁷¹ defined ‘dividend’ as the payment made out of profits to a shareholder of a company from time to time. This payment is only made to shareholders as return on investment while the company is a going concern. In other words, entitlement to a dividend can arise only before the winding up of the company in question.

Section 385 of the Act provides that dividends shall be special debts due to, and recoverable by, shareholders within 12 years, and actionable only when declared. By Section 382 of the same Act, where dividends are returned to the company unclaimed, the company shall send a list of the names of the persons entitled with the notice of the next general meeting of the members. If three months after the notice, the dividends are still unclaimed, the company may invest the unclaimed dividends in any investment outside the company without paying any interest on them. If however, dividends have not been sent to members due to the fault of the company, the dividends shall earn interest at the current bank rate after three months from the date on which they ought to have been posted.

The power to declare dividends is vested in the board of directors. Section 379(1) of the Act provides that a company may, in general meeting, declare dividends in respect of any year or other period only on the recommendation of the directors. Therefore, shareholders only have a legal right to the payment of dividends after, and to the extent that, the board of directors declares any. Hence, it was held in **Bond v. Barrow Haematite Steel Co.**,¹⁷² that until a dividend is declared, the shareholders could not sue for it and the court could not override the discretion given to the directors to declare dividends. Since the

¹⁷¹ (1994) 7 NWLR (Pt. 357) 414 at page 467

¹⁷² (1902) 1 Ch. 279.

declaration of dividends rests in the directors' discretion, the shareholder has no effective intra-corporate remedy to overcome a failure to declare dividends, even though funds are available. An exception is as provided in section 384 of the Act.

Under section 384 of the Act, if under his contract of service an employee is entitled to share in the profits of the company as an incentive, he shall be entitled to share in the profits of the company, whether or not dividends have been declared. This invariably entitles an employee shareholder to enforce payment of his share of the profits of the company under his contract of service irrespective of the declaration of dividends by the company. Similarly, a shareholder could bring a court action to compel the directors to meet and declare dividends for abuse of discretion. Therefore, the burden lies on such a shareholder to prove abuse of discretion. This, he can do by proving fraud, bad faith or clear unreasonableness on the part of directors.¹⁷³

Besides declaration of dividends by the directors, dividends are payable only if the company will be solvent after the payment. Thus, section 381 of the Act provides that a company shall not declare or pay dividends if there are reasonable grounds for believing that the company is or would be, after the payment, unable to pay its debts as they become due. Similarly, dividends are payable only out of profits. In other words, dividends cannot be paid out of issued capital¹⁷⁴ and any contravention of this principle will make the directors personally liable.¹⁷⁵ Section 380 of the Act provides that subject to the company being able to pay its debts as they fall due, the company may pay dividends out of the following profits:

- (a) Profits arising from the use of the company's property (that is, trading profits);

¹⁷³ Dodge v. Ford Motor Co. (1919) 204 Mich. 459.

¹⁷⁴ Asomugha, E.M. (1973). The Shareholder, His Rights and Liabilities. *NLJ* 7; 100 at p. 107.

¹⁷⁵ Section 386 CAMA. This is a codification of the decision in *Re London and General Bank* (1895) 2 Ch. 166.

(b) Revenue reserves (that is, profits not previously utilized by distribution or capitalization);

(c) Realized profit on fixed asset sold, but where more than one asset is sold, the net realized profit in the assets sold.

Another way shareholder can benefit economically in the company is by selling his shares at a profit. This right of alienation flows from the fact that shares is a form of personal property.¹⁷⁶ It is of the ultimate importance to shareholders both because it is a means of obtaining economic benefit from their investment in the corporation and also because it is their means of exit should they become dissatisfied with management. However, the law does allow for some restrictions on the right to sell shares. For example, a controlling shareholder may not sell her shares to a known or suspected looter because this carries too great a risk of harm to minority shareholders.¹⁷⁷

2.9.2 Control Rights

The authority to manage the business of company is generally vested in the board of directors. However, shareholders have the right to vote on important matters relating to the business,¹⁷⁸ which gives them some control over the company.

The right to vote is regarded as an inherent part of share ownership, and, therefore, as a property right.¹⁷⁹ As a result, the shareholder is entitled, by statute or as a matter of general law, to one vote per share.¹⁸⁰

¹⁷⁶ Section 115 CAMA. To say that shares are the property of the shareholder is not necessarily to suggest that the company and its assets are the property of the shareholder.

¹⁷⁷ *Hollinger Int'l, Inc. v. Black*, 844 A. 2d 1022, 1087 & n.151 (Del. Ch. 2004).

¹⁷⁸ Sections 81, 227 and 114(b) CAMA. It was held in *Sun Insurance Nig. Plc & Anor v. LMB Stock Brokers Ltd & Ors* (2005) 12 NWLR (Pt. 940) 608 that a member of a company or shareholders is entitled by virtue of the shareholding to certain statutorily prescribed rights which include attendance and voting at Annual General Meetings.

¹⁷⁹ *Brown v. McLanahan*, 148 F. 2d 703 (4th Cir. 1945). Also, in *Carruth v. I.C.I. Ltd* (1937) A.C. 707 at p. 765, it was held per Lord Maugham, "The shareholder's vote is a right of property, and prima facie may be exercised by a shareholder as he thinks fit in his own interest."

¹⁸⁰ Section 224 CAMA. However, in some specified circumstances, preference shares may carry more than one vote per share – sections 143 & 116(3) CAMA.

As directors invariably hold a strong position of de facto control within the company, the shareholder's right to vote is often seen as the source of corporate control.¹⁸¹ Voting can be done by proxy.

Section 230(1) of the Act provides that any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as his proxy to attend and vote instead of him.¹⁸² The Act requires every notice of meeting of a company having a share capital to contain a statement that a member having the right to attend and vote at the meeting is entitled to appoint a proxy to attend and vote instead of him and that a proxy need not be a member.¹⁸³ A person appointed as a proxy shall have the same right as the member to speak at the meeting. Chief among their voting rights is the right to appoint directors,¹⁸⁴ who in turn manage the business of the company.¹⁸⁵ Shareholder voting rights are not limited to the appointment of directors. Shareholders also are permitted to vote on certain fundamental matters.¹⁸⁶ The right to vote on fundamental matters gives shareholders a voice in corporate affairs. However, this right is limited.

First, shareholders generally can vote only on matters submitted to them by the directors. Shareholders can neither propose their own transactions or articles amendments, nor modify those proposed by directors. Moreover, directors often can find ways around the shareholder approval requirement. Thus, they limit shareholders' ability to exercise their control rights effectively.

¹⁸¹ Asomugha E.M., (1994). *Company Law in Nigeria under the Companies and Allied Matters Act*. Lagos. Tema Micro Publishers Ltd, p. 101.

¹⁸² A proxy need not be a member of the company. The instrument appointing a proxy must be in writing under the hand of the appointor or his attorney duly authorized in writing. If the appointor is a company, then the instrument must be under seal or under the hand of the officer or attorney duly authorized – see section 230(2) CAMA.

¹⁸³ Section 218(4) CAMA. If default is made in complying with this requirement, every officer of the company who is in default shall be guilty of an offence and liable to a fine.

¹⁸⁴ Sections 247 and 248 CAMA.

¹⁸⁵ Section 247 CAMA.

¹⁸⁶ For instance, amending the articles of association, selling substantial parts of corporate assets, merging with another company or dissolving the company. In theory, this should give shareholders ultimate control over the business. In practice, however, it does not.

Secondly, it is common knowledge that individual shareholders generally are not interested in – or, at least, not capable of – exercising their control rights effectively. As Professors Adolf A. Berle, Jr., and Gardiner C. Means¹⁸⁷ argued long ago, shareholders often are virtually powerless against management.¹⁸⁸ Because each individual shareholder owns only a very small percentage of the outstanding shares of the company, he does not have a stake sufficient to make monitoring worthwhile. After all, becoming informed is costly; it is also futile, because one shareholder’s meager vote is unlikely to affect the outcome. Thus, shareholders tend to be rationally apathetic¹⁸⁹ and support the incumbent board on the notion that the directors are experts and have access to greater information.¹⁹⁰ Even if they wanted to oppose the incumbents, however, shareholders would have a difficult time. Shareholders generally do not attend shareholders’ meetings, but rather exercise their right to vote by proxy. Directors have control over the proxy mechanism and, in many ways; the process is stacked against the shareholders.¹⁹¹

Although shareholders face many obstacles in exercising their right to appoint directors, the fact remains that only shareholders can appoint first directors.¹⁹² As shareholder dissatisfaction with existing management grows, it becomes easier for someone to wage a proxy contest to convince shareholders to vote against the incumbent directors. Thus, under certain circumstances, the right to appoint directors can become quite meaningful.

¹⁸⁷ Adolf A. Berle Jr. and Gardiner C. Means (1932). *The Modern Corporation and Private Property*. New York. The Macmillan Company.

¹⁸⁸ Ibid

¹⁸⁹Rational apathy on the part of the shareholders stems from dispersed ownership; with large institutional investors holding significant minority interests in many corporations, the old paradigm was becoming inapplicable.

¹⁹⁰ Bernard S. Black (1990). Shareholder Passivity Reexamined. *MICH. L. REV.* 89; 520, 526-29; Jeffrey N. Gordon (1989). The Mandatory Structure of Corporate Law. *COLUM. L. REV.* 89; 1549, 1575-77: (discussing rational apathy).

¹⁹¹ Bernard S. Black op cit., at 530-66, 592-95.

¹⁹² Section 247 CAMA.

2.9.3 Information Rights

Shareholders also have the right to at least some information about the company's affairs. The right to be informed about corporate conditions and transactions is a necessary prerequisite to the effective exercise of shareholder rights.

The directors are required under the Act to prepare financial statements for each year.¹⁹³ The financial statements are the balance sheet, the profit and loss accounts and, in the case of a holding company, the group accounts. A copy of the balance sheet, together with the profit and loss account, the directors' report and the auditors' report must be laid before the company at its annual general meeting. Copies of these financial statements must be sent to every shareholder not less than 21 days before the date of the meeting.

In addition, the Act requires every company to maintain certain registers. They include the register of members,¹⁹⁴ index of members,¹⁹⁵ register of directors' interests,¹⁹⁶ register of directors and secretaries,¹⁹⁷ register of charges¹⁹⁸ and register of debenture holders.¹⁹⁹ These registers are kept at the company's registered office and must be open to inspection during business hours by any shareholder of the company without fee.

Section 370 of the Act also requires every company, once at least in every year, to make and deliver to the Corporate Affairs Commission a return called the "annual return", usually accompanied by the financial statements. There are other returns that are made on the occurrence of specified events. For instance, whenever a company limited by shares

¹⁹³Section 331 CAMA.

¹⁹⁴ Section 83 CAMA.

¹⁹⁵ Section 85 CAMA.

¹⁹⁶ Section 275 CAMA.

¹⁹⁷ Section 292 CAMA.

¹⁹⁸ Section 191CAMA.

¹⁹⁹ Section 193 CAMA.

makes any allotment of its shares, the company must within one month thereafter deliver to the Commission a return of the allotment on the prescribed form.²⁰⁰

Also, whenever a company creates a charge on its property or undertaking, a return must be made within ninety days thereafter to the Commission otherwise the charge will be void.²⁰¹ In the same vein, whenever the debt for which the charge was given has been paid, the company must send a memorandum of satisfaction to the Commission.²⁰²

In any case, documents filed with the Commission are considered as public documents²⁰³ and are open to inspection by shareholders and other interested persons upon payment of a prescribed fee.

Other information rights of shareholders include right to copy of Memorandum and Articles of Association;²⁰⁴ right to receive notice of meeting for alteration of business/objection;²⁰⁵ right to receive yearly financial statements;²⁰⁶ right to obtain copy of the company's last financial statements;²⁰⁷ entitlement to notice of meeting;²⁰⁸

2.9.4 Litigation Rights

There are three different types of actions open to a minority shareholder under the Companies and Allied Matters Act. These are personal action, representative action and derivative action.

Generally, the decision to bring an action on behalf of the company is part of management powers which belongs to the board of directors subject to the provisions of the Articles of

²⁰⁰ Section 129 CAMA.

²⁰¹ Section 197 CAMA.

²⁰² Section 204 CAMA.

²⁰³ Section 102(b) Evidence Act, 2011 (as amended).

²⁰⁴ Section 42 CAMA.

²⁰⁵ Section 46 CAMA.

²⁰⁶ Section 344 CAMA.

²⁰⁷ Section 349 CAMA.

²⁰⁸ Sections 95(2), 219, 220, 222 and 228 CAMA; see ss. 95(5) and 221 CAMA for sanctions in case of default.

the company. This is especially so because, technically speaking, derivative actions are brought on behalf of the company, and it is the directors who are entitled to decide whether or not to pursue legal action.²⁰⁹ However, a shareholder may institute a personal action against the company to enforce a right due to him personally.²¹⁰ Such a right may originate from the articles of association, or from a separate contract between the shareholder and the company, or from some special duty owed to the shareholders by the directors. In any case, a shareholder suing in his personal capacity shall not be entitled to damages but only to declaration or injunction to restrain the company or the directors from doing a particular act. However, the court may award cost to him whether or not his action succeeds.²¹¹

Similarly, shareholders have the right to seek judicial enforcement of their other rights under certain circumstances. Firstly, shareholders have the right to take legal action on behalf of the company when directors are conflicted²¹² or if the board of directors refuses or neglects to do so.²¹³

Most significantly, they have the right to seek enforcement of, and redress for breach of, management's fiduciary duties to the company by means of derivative litigation.²¹⁴ To enforce rights, shareholders have to seek redress in the law courts. Hence, any member who feels aggrieved may approach the court for declarations and/or injunctions to restrain the company from the following:

²⁰⁹ Sections 63(3) and 299 CAMA. See also the case of *Odutola Holdings Ltd & Ors v. Ladejobi* (2006) 5 SC (Pt. 1) 83 where it was held that under and by virtue of the provisions of section 63 of CAMA the directors of a company are competent to institute an action for the protection of the business of the company, save where the defendants are able to show otherwise from the company Memorandum and Articles of Association, that the directors lack capacity to do so.

²¹⁰ For instance, right to sue for dividends declared by directors – Section 385 CAMA.

²¹¹ Section 301 CAMA.

²¹² Section 63(5)(a) CAMA.

²¹³ Section 63(5)(b) CAMA. This permits them to enforce the duties of which they are the indirect beneficiaries.

²¹⁴ Section 300(f) CAMA.

- a. entering into any transaction which is illegal or ultra vires;²¹⁵
- b. purporting to do by ordinary resolution any act which by its constitution or the law requires to be done by special resolution;²¹⁶
- c. any act or omission affecting the applicant's individual rights as a member;²¹⁷
- d. committing fraud affecting the company or the minority shareholders where the directors fail to take appropriate action or redress the wrong done;²¹⁸
- e. where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or minority shareholders;²¹⁹
- f. where the directors are likely to derive a profit or benefit from or have profited or benefited from their negligence or their breach of duty.²²⁰

Shareholders can also seek redress in the law courts for unfairly prejudicial and oppressive conduct. Sections 310 - 312 of the Act contain provisions of relief that can be sought by any shareholder on the grounds of unfairly prejudicial and oppressive conduct. If the court is satisfied that the petition so made is founded, it may make such orders as it thinks fit for giving relief to the petitioner. Such order can include winding up the company; regulating the affairs of the company in the future; the purchase of shares of any member by other members of the company; the purchase of the shares of any member by the company and reducing the capital of the company accordingly; among other orders. The circumstances under which shareholders may bring actions in their own name are limited. For example,

²¹⁵ Section 300(a) CAMA. Thus, in *Parke v. Daily News* (1962) 2 All ER 929, it was held that a member of the company can ask for a declaration that certain actions which the directors propose to take are ultra vires the company. See also *Hutton v. West Cork Rly Co.* (1883) 23 Ch.D. 564.

²¹⁶ Section 300(b) CAMA. In *Beallie v. Oriental Telephone Co. Ltd* (1915) 1 Ch. 503, where the directors were acting on a purported special resolution of which sufficient notice had not been given, it was held that a minority shareholder was entitled to an injunction.

²¹⁷ Section 300 (c) CAMA. Thus, in *Pender v. Lushington* (1877) 6 Ch.D. 70, where the directors refused to record the vote of the plaintiff at a general meeting, it was held that the applicant had a right to vote and to sue to compel the directors to record his vote.

²¹⁸ Section 300(d) CAMA.

²¹⁹ Section 300(e) CAMA. See also *Hodgson v. N.A.L.G.O.* (1972) 1 All E.R. 15.

²²⁰ Section 300(f) CAMA.

they may sue for the non-payment of dividends. However, this is true only if they have a legal right to dividends.²²¹

According to section 41 (4) of the Act, in an action to enforce any obligation owed under the Memorandum or the Articles to him and any other member or officer, such member, or officer, may, if any other officer is affected by the alleged breach of such obligation with his consent, sue in a representative capacity, on behalf of himself and all other members or officers who may be affected.

Although the shareholder has some rights in the company, there are also correlative duties imposed. As a duty, every member of a limited company must acquire at least one share attracting at least one vote, or possess some guaranteed voting interest, in the case of a company limited by guaranteed. In both cases, the member must also ensure that his name is duly entered in the register of members of the company. Thus, in the case of **Jerry Ilondu & Ors v. Chief Osita Ezeoke & Ors.**²²² delivered by the Court of Appeal, Enugu Division on 24th July, 1997, the appellate court relying on the authority of **Electric Sparks case**,²²³ held that the membership of a company is dependent upon payment for all shares allotted and the registration of the person in the register of members of the company.

²²¹ That is, after dividends have been declared by the board of directors.

²²² (Unreported) Suit No. CA/E/167/95.

²²³ (1985) 2 NWLR (Pt.23) 514.

CHAPTER THREE

DUTIES AND LIABILITIES OF DIRECTORS

3.1 INTRODUCTION

Directors are important officers of the company and constitute one organ of corporate administration. They have been regarded differently as trustees, agents and fiduciaries of the Company.²²⁴ As trustees, directors have control of the company's funds, properties and assets, and thus must be responsible and accountable; they must exercise powers honestly in the interest of the company and not in their own interest.²²⁵ For the purpose of the exercise of the company's powers, directors are agents of the company when acting within the scope of their authority and powers on behalf of the company. Much is also forbidden to directors because they occupy fiduciary position - the taking of remuneration not authorized by the articles of association, the taking of bribes or the making of contracts with the company without special authority and full disclosure.²²⁶

3.2 MEANING, APPOINTMENT AND REMOVAL OF DIRECTORS

3.2.1 Meaning of Directors

The directors of a company are persons duly appointed by the company to direct and manage the business of the company whether in an executive or non-executive capacity.²²⁷ A person is deemed to be duly appointed and has authority to exercise the powers and perform the duties customarily assigned to directors who is so described in the particulars required to be filed with the Corporate Affairs Commission pursuant to the provisions of

²²⁴ See section 283 (1) and (2) of the Companies and Allied Matters Act, Cap. C20, LFN, 2004; see also the case of *Yalaju-Amaye v. Associated Registered Engineering Contractors Ltd* (1990) 4 NWLR (Pt. 145) 422, per Nnaemeka-Agu, JSC.

²²⁵ *Selangor United Rubber Estates Ltd v. Craddock (No.3)* (1968) 1 WLR 1555; *Piercy v. S Mills and Co Ltd* (1920) 1 Ch. 77.

²²⁶ See Sections 279, 267, 390(7), 280(4), 277, 287(1), 284 and 287 CAMA.

²²⁷ Section 244 CAMA; see also *Longe v. First Bank of Nigeria Plc* (2010) ALLFWLR Pt. 525, page 294, paras D-E, and G-H.

sections 35 and 292 of the Act.²²⁸ The term “director” also includes a shadow director; that is, a person on whose directions and instructions the directors are accustomed to act.²²⁹

However, the fact that a person in his professional capacity gives advice which a director acts upon customarily does not automatically render such a person a director.²³⁰ Directors are variously called by other names depending on the positions they occupy.²³¹ For instance, executive and non-executive directors, managing directors,²³² life directors,²³³ representative directors²³⁴ and alternate directors, etc.

Directors are officers²³⁵ and the alter ego of the company. Thus, they are said to be the mind and brain behind company’s activities and constitute the policy making as well as the executive organs of the company.²³⁶

Schmitthoff , Kay and Morse,²³⁷ in their book, define the term ‘directors’ as the persons by whom a company acts and by whom the business of the company is carried on or superintended. The Supreme Court of Nigeria in the case of **Marine Management Association INC. & Anor v. National Maritime Authority**²³⁸ captured graphically the role, duties and importance of company’s directors as follows:

²²⁸ Section 69(b) CAMA. Accordingly, there is a rebuttable presumption in favour of any person dealing with the company that all persons who are described by the company as directors have been duly appointed - section 244(2) CAMA. See also sections 68 and 69 of the Act on abolition of rule of constructive notice and presumption of regularity. Nevertheless, where a person not duly appointed as a director by the company holds himself out as such, his acts would not bind the company but such a person shall be personally liable for his acts unless the company is shown to have held him out, in which case the company shall be bound by his acts. By section 250 of the Act, a member can apply to court to restrain both the company and such a person from being paraded as a director unless duly appointed – see section 244(4) of the Act.

²²⁹ See sections 245 and 567 CAMA. See also *Olufosoye v. Fakorede* (1993)1 NWLR (pt. 272) 747. Note that shadow director need not be appointed.

²³⁰ Section 245(3) CAMA.

²³¹ See section 567 CAMA. This description is purely based on function.

²³² section 64(b) CAMA.

²³³ Section 255 CAMA. It should be noted that appointment for life carries no extra assurance of tenure as a director for life is removable at any time like any other director under section 262 CAMA.

²³⁴ Section 231CAMA.

²³⁵ Section 567 CAMA.

²³⁶ See section 63(3) CAMA.

²³⁷ Schmitthoff, C.M., Kay M. and Morse G.K. (1976). *Palmer’s Company Law* (22nd ed.)Vol.1. London. Stevens & Sons, p. 625.

²³⁸ (2012)18 NWLR (pt. 1333) 506.

“A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of company and is treated by the law as such.”

Similarly, **Farewell, L.J** restating the positions of the law on the status of company directors in **Salmon v. Quin and Axtens Ltd**²³⁹ declared thus: *“This court decided not long since that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company’s affairs”*.

Finally, **Sir Jessel M.R.** in the case of **Re Forest of Dean Coal Mining Company**²⁴⁰ had stated as follows:

“Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners. It does not matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and all other shareholders in it...”

3.2.2 Appointment of Directors

The appointment of directors is governed by the Act and the articles of association. Section 246 of the Act requires that before a company whether public or private is registered it must have at least two directors. The particulars of the first directors and their consent is part of the registration requirement under section 35(2)(c) of the Act. It is provided that the board may increase the number of directors so long as it does not exceed the maximum allowed by the Articles, but the general meeting has the power to increase

²³⁹ (1909)1 Ch. 311@319.

²⁴⁰ (1878) 10 Ch. D 450 or 40 LT 287.

or reduce the number of directors generally and may determine in what rotation the directors shall retire.²⁴¹ The emergence of directors in a company is governed by sections 247, 248 and 249 of the Act.

Directors are usually appointed by members at the general meeting. The first directors of the company are determined in writing by the subscribers to the memorandum of association or a majority of them or they may be named in the articles.²⁴² The subsequent directors are appointed by the members at the Annual General Meeting.²⁴³ Where there is a casual vacancy on the board owing to death, resignation, retirement or removal, the directors at their board meeting can fill such casual vacancy pending the approval by members at the next annual general meeting.²⁴⁴ Section 248(1) of the Act give the members at the general meeting power to re-elect or reject directors and appoint new ones. If the person so appointed to fill a casual vacancy is not approved by members at the next annual general meeting, he automatically ceases to be director forthwith.²⁴⁵ In the event of all the directors and shareholders dying, any of the personal representatives may apply to court for an order to convene a meeting of all the personal representatives of the shareholders entitled to attend and vote at a general meeting to appoint new directors.²⁴⁶ Failing this the creditors, if any, shall have the right to apply to court for an order to call a meeting of creditors to elect new directors to manage the company.²⁴⁷

²⁴¹ Section 249(3) CAMA. Section 259 of the same Act requires all directors to retire from office at the first annual general meeting.

²⁴² Section 247 CAMA; the first directors and their consent is part of the registration requirement under section 35(2)(c) of the Act.

²⁴³ Section 248 CAMA.

²⁴⁴ Section 249 CAMA.

²⁴⁵ Section 249(2) CAMA. Section 248(1) of the Act generally empowers members at the general meeting to re-elect and reject directors and appoint new ones.

²⁴⁶ Section 248(2) CAMA. By virtue of section 41(3) of the Act, the company may in its Memorandum or Articles empower any person to appoint or remove any director of the company, regardless of whether or not such a person is a member or officer of the company.

²⁴⁷ Section 248(2) CAMA. By virtue of section 41(3) of the Act, the company may in its Memorandum or Articles empower any person to appoint or remove any director of the company, regardless of whether or not such a person is a member or officer of the company.

From the foregoing, directors of the company can be appointed into office at different forums, namely; at the meetings of members, directors, shareholders, personal representatives of shareholders and creditors.²⁴⁸

It is eye-opening that section 244(3) of the Act criminalizes the situation where a person who is not director holds himself out as such. The subsection provides:

“(3) Where a person not duly appointed acts or holds himself out as a director, he shall be guilty of an offence and on conviction shall be liable to imprisonment for two years or to a fine of #100 for each day he so acts or holds out himself as a director or to both such imprisonment or fine and shall be restrained by the company.”

3.2.3 Removal of Directors

Directors are removable from office with or without cause, irrespective of the contract between them and the company. The removal of directors from office is by a simple resolution of members at general meetings. The Act²⁴⁹ in section 262(1) provides that a company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between the company and the director. The effect of this provision is that even a person appointed a director for life²⁵⁰ or as a permanent director by the articles or by any agreement may nevertheless be removed by the general meeting, subject, of course, to his right to compensation or damages for breach of contract, if any.²⁵¹

The section tries to ensure that shareholders who own the company are able at anytime to exercise their ownership right to remove from office any director of whose conduct they

²⁴⁸ Section 41(3) of the Act gives the company right to use its Articles or Memorandum of Association to confer on any person power to appoint or remove a director and the person may exercise such power even if he is not a member of the company. See sections 248 and 261 of the Act for the mode of voting on appointment of directors of public companies. It is worthy of note that it is not every person who is eligible to be appointed as a director and permitted to sit on the board of directors of a company in Nigeria in view of the provision of section 257 of the Act which disqualifies certain persons on ground of age and character from being appointed as directors of a company. The persons disqualified include: persons under the age of eighteen, lunatics or persons of unsound mind, insolvent persons, fraudulent persons and bankrupts, Ss.253, 254 and 258 a corporation unless by its representative appointed to the board for a given term.

²⁴⁹ CAMA.

²⁵⁰ Section 255 CAMA provides that a person may be appointed a director for life provided that he shall be removed under section 262. A life director is only protected from being affected by retirement and rotation rule – see section 259 (1) & (2) CAMA.

²⁵¹ See sections 262, 268(2) and 271 CAMA; see also *Longe v. First Bank of Nigeria Plc* [2006] 3 NWLR (Pt. 967) 228 (Court of Appeal) (affirming the judgment of the lower court which held that the Bank had the right under the CAMA to remove the appellant, the bank's managing director, from office. Nevertheless, this position contrasts sharply with the state of Delaware, where directors cannot be removed without cause if the certificate of incorporation establishes staggered terms for directors. See DEL. CODE ANN. tit. 8, s.141(k) (2007).

disapprove. It is an endorsement of the Golden Rule of Capitalism that the right to “hire” imports the right to “fire”.²⁵² In fact, the provision of section 262(1) of the Act has been described as a key provision of modern company law in that it is designed to check the balance of power which is normally with the directors who manage the company by enabling “the shareholders to assert themselves against the directors, if need be and make it clear that the ultimate control is in the hands of the proprietors of the company if they are not the directors.”²⁵³

The power to remove a company director is both statutorily and inherently vested in the general meeting.²⁵⁴ Shareholders are at liberty to propose any person as a director, and there may also be an agreement in the article empowering named persons to appoint or remove directors, and the person may exercise such power regardless of whether or not he is a member of the company.²⁵⁵ The case is different with regard to the position of managing director who is appointed by the board of directors and can only be removed by them. Where a managing director is removed only his position as managing director is affected; he remains a director. Similarly, the general meeting cannot directly remove the managing director except by removing him as a director of the company. Where he is removed as a director, he automatically ceases to be the managing director. The same thing goes for the Chairman of board of directors. This is in accord with the dictum of **Lord Normand** of the Scottish Court of Session as follows:

The managing director has two functions and two capacities. Qua managing director he is a party to a contract with the company, and this contract is a contract of employment; more specifically I am of opinion that it is a contract of service and not a contract for services. There is nothing anomalous in this; indeed it is a commonplace of law

²⁵² See Sargant Florence P. (1961). *Ownership, Control and Success of Large Companies*, p. 60.

²⁵³ Palmer’s *Company Law*”, paragraphs 60-62, page 898, cited by Orojo, J.O. (2008) *Company Law and Practice in Nigeria* (5th ed.). Lagos. LexisNexis Butterworths, page 254.

²⁵⁴ See sections 262 CAMA, and 63(5) of CAMA which grants residual powers to the members in general meeting to do all things which the directors are not empowered to do by law or the articles of association of the company or could not do. One of such matters is removal of directors.

²⁵⁵ See CAMA, section 41(3).

that the same individual may have two or more capacities, each including special rights and duties in relation to the same thing or matter or in relation to the same person.²⁵⁶

However, neither the members of a company nor the board of directors have an inherent power to remove directors before the normal expiration of their period of office in the absence of a power to do so in the articles. If the articles do not specify the duration of a director's appointment, he holds office at will and may be removed by an ordinary resolution of the company without any further liability.²⁵⁷

Also, regulatory authority acting pursuant to its enabling law or other laws can suspend or remove a director of a company operating within the sphere of its control. For instance, the power of the Governor of the Central Bank of Nigeria to remove directors of failing Nigerian banks under section 35 (1) and (2) of the Banks and Other Financial Institutions Act (BOFIA).²⁵⁸ This power is vested in and exercisable by the Governor of the Central Bank of Nigeria regardless of any contrary or protective provision in any law or articles of association of the affected bank.²⁵⁹

In practice, removal of director is not always a smooth process as it often results in controversy with seemingly inconsistent judicial decisions.²⁶⁰ Therefore, strict observance of procedural approach for successful removal of a director is very imperative.

Before embarking on the removal of a director of a company, the first step is to look at the articles of association of the company or any other agreement to ascertain if it provides for the procedure for removal of directors. If the articles or other agreement contain provisions with respect to removal of directors, the company must follow that

²⁵⁶ Anderson v. James Sutherland (Peterhead) Ltd (1941) Session Cases 203 quoted in Hahlo H.R. (1970). *A Casebook on Company Law*. London. Sweet & Maxwell, 345-346.

²⁵⁷ See Iwuchukwu vs. Nwizu (1994) 7 NWLR (Pt. 257) 379, per Ogwuegbu, JSC at page 410.

²⁵⁸ (As amended), Cap. B3, Laws of the Federation, 2004.

²⁵⁹ See section 35(2)(d) BOFIA.

²⁶⁰ See, for instance, decisions of courts in Longe v. First Bank of Nigeria Plc (2006) 3 NWLR (Pt. 967) 228; Yalaju-Amaye v. AREC Ltd (1990) 4 NWLR (Pt. 145) SC 422, and Iwuchukwu v. Nwizu (1994) 7 NWLR (Pt. 357) SC 379.

procedure;²⁶¹ but if there is none, then the procedure shall be in accordance with section 262 of the Act. In order that this right is not abused by the company, the section guarantees the director sought to be removed the right to receive notice of the resolution to remove him and to make a representation in writing to the company concerning the circumstances of his removal.²⁶² The director's representation may be read out at the meeting unless it appears to the court that this right is being abused by the director to secure needless publicity for defamatory matter.²⁶³

The removal of a director is without prejudice to his right to claim compensation or damages for breach of his contract of employment. Thus, section 262(6) of the Act provides

Nothing in this section shall be taken as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as a director or of any appointment terminating with that as director, or as derogating from any power to remove a director which may exist apart from this section.

Indeed, section 268(2) and (3) of the Act specifically directs that a managing director be compensated if his removal breaches his contract under the company's articles.

Thus, in **Iwuchukwu vs Nwizu**,²⁶⁴ **Uwais JSC** (as he then was) observed *inter alia*²⁶⁵ that:

“... where a director is removed under a power in the articles of association or in accordance with section 175(1) of the Companies Act, 1968 (which is in *pari materia* with section 262(1) of the Companies and Allied Matters Act) or, indeed, by an ordinary resolution, he may sue by virtue of the provisions of section 175(6) of the Companies Act, 1968 (which is in *pari materia* with section 262(6) of the CAMA) for wrongful dismissal or compensation for

²⁶¹ The Supreme Court held in *Yalaju-Amaye v. Association of Registered Engineering Contractors Ltd* (1990) 4 NWLR (Pt. 145) 422, that where the procedure stated for the removal of a director is not followed, the removal can be set aside by the courts.

²⁶² CAMA section 262(2). Section 262(2) introduces a right to fair hearing for the benefit of directors.

²⁶³ Section 262(3) CAMA; see also *Longe vs. First Bank of Nigeria Plc* (2006) 3 NWLR (Pt. 967) 228 at 273.

²⁶⁴ Ante.

²⁶⁵ At page 404.

loss of office, if he has an express service contract which does not empower the company to dismiss him in that way.”²⁶⁶

This is why **Ogwuegbu, JSC** remarked²⁶⁷ that, “The removal of a director under section 175(1) of the Companies Act, 1968 may be costly to the company because his removal does not prejudice any right which he has to compensation for loss of office or to damages for wrongful dismissal”

However, a director will not be entitled to compensation if he or she:²⁶⁸

- i. is guilty of fraud or gross misconduct;
- ii. instigated or has taken part in bringing about his or her removal as director;
- iii. resigns.

Discussing the effect of subsection (6) of section 262 of the Act which states that ‘nothing in the section shall be taken as derogating from any power to remove a director which may exist apart from the section’, a respected contributor, **Osuji**, suggests that the statutory power of removal of a director should only be exercised where the articles are silent on the removal of the director, or where it is impracticable or difficult to remove the director in accordance with the provisions of the articles or the service contract. The reason, he says, is that a director removed in accordance with the articles cannot bring an action for breach of contract since the removal was effected as provided in the articles which constitute a contract between the director and the company.²⁶⁹

²⁶⁶ See also *Southern Foundries (1926) Ltd v. Shirlaw* (1940) 2 All ER 445; (1940) AC 701.

²⁶⁷ At page 40

²⁶⁸ See *Yalaju-Amaye v. Association of Registered Engineering Contractors Ltd* (1990) 4 NWLR (Part 145) 422; *Longe v. FBN* (2010) 6 NWLR (Part 1189) 1.

²⁶⁹ *Osuji, O. (2003). Removal of a Director: An Appraisal. Modern Practice Journal of Finance & Investment Law, 7* (3-4); 355, 377 (hereafter *Osuji, “Director”*) at 372.

3.3 POWERS AND PROCEEDINGS OF DIRECTORS

Section 38 of the Companies and Allied Matters Act²⁷⁰ gives a company all the powers of a natural person of full capacity for the furtherance of its authorized business or objects. These powers of the company are given to directors in section 63(3) of the Act and usually set out in the Articles, to the extent that the board of directors may exercise all such powers of the company as are not expressly reserved to members in general meeting.

The powers of directors of a registered company in Nigeria include the powers to pass board resolution proposing reduction and preparation of proposed scheme of reduction of share capital;²⁷¹ appointing company representative;²⁷² proposing alteration of Articles of Association;²⁷³ appoint company secretary;²⁷⁴ appoint first auditors of the company;²⁷⁵ appoint new directors to fill any casual vacancy however arising;²⁷⁶ convene and adjourn company's meetings;²⁷⁷ authorizing the company Secretary to summon general meeting of the company;²⁷⁸ allot shares;²⁷⁹ make calls on unpaid shares;²⁸⁰ recommend amount of money to be declared as dividends;²⁸¹ make provisions by the issue of fractional certificates or payment in the case of shares or debentures becoming distributable in fractions;²⁸² prepare financial statements and fix financial year for the company;²⁸³ prepare directors' report²⁸⁴ and institute actions in the name and on behalf of the company.²⁸⁵

²⁷⁰ Op cit.

²⁷¹ Section 379(3) CAMA.

²⁷² Section 231 CAMA.

²⁷³ Section 240 CAMA.

²⁷⁴ Sections 295 and 296(1) CAMA.

²⁷⁵ Section 357 CAMA.

²⁷⁶ Section 249(1) CAMA.

²⁷⁷ Sections 211, 213, 215 and 263(3) CAMA.

²⁷⁸ Section 298(1)(d) CAMA.

²⁷⁹ Section 124 CAMA.

²⁸⁰ Section 133 CAMA.

²⁸¹ Section 379 CAMA.

²⁸² Section 383(7) CAMA.

²⁸³ Section 334 CAMA.

²⁸⁴ Section 342 CAMA.

²⁸⁵ Section 63(3) & 299 CAMA.

Generally, the wide powers conferred on the directors are exercisable collectively as a board and not individually by members of the board. However, some of the powers may be entrusted or delegated to a committee of directors or a managing director.²⁸⁶ In addition, in the normal course of business, directors may also need to delegate some of their powers to staff and officers.²⁸⁷ It is only when directors act as a board that they are regarded as an organ or agents for their company and therefore entitled to exercise the powers vested in them by the Act or the Articles.²⁸⁸

The directors may appoint one of themselves as Chairman of the board of directors who shall preside over the board meeting²⁸⁹ and also over general meeting of the company.²⁹⁰

The directors may meet, adjourn and regulate their meeting as they think fit, provided that the first board meeting must not be later than six months after the company's registration.²⁹¹ However, for a private company, a resolution in writing signed by all the directors entitled to receive notice of a meeting of directors shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held.²⁹² This is so whether the board of directors is of a public or private company. In all the directors' meetings, each director is entitled to one vote.²⁹³

The quorum for meeting of the board of directors shall be two where there are not more than six directors. Where there are more than six directors the quorum shall be one-third of the number and where the number is not a multiple of three, one-third to the nearest number. The quorum for committee meetings shall be fixed by the board, but where no

²⁸⁶Sections 64 and 263(5). CAMA.

²⁸⁷See *Re City Equitable Fire Insurance Co* (1925) Ch. 407.

²⁸⁸ See *Carib Construction Co. Ltd v. Lynch*; CCHCJ/12/73/29/(Unreported) at Page 32 – cited by Orojo J.O. (2008). *Company Law and Practice in Nigeria* (5th ed.). South Africa. LexisNexis at 259.

²⁸⁹ Section 263(4) CAMA.

²⁹⁰ Section 240 CAMA.

²⁹¹ Section 263(1)CAMA.

²⁹² This provision is applicable to only private limited companies.

²⁹³ Section 263(9) CAMA.

quorum is fixed the whole committee shall meet and act by a majority.²⁹⁴ It is provided that where the board is unable to act because a quorum cannot be formed the general meeting may act in place of the board. Likewise, the board may act in place of a committee where it is unable to form a quorum.²⁹⁵

3.4 DUTIES OF DIRECTORS

Directors' duties are a series of statutory, common law and equitable obligations owed primarily by members of the board of directors to the company that employs them. These duties are analogous to duties owed by trustees to the beneficiaries and agents to principals, respectively, and usually serve as controls over the wide-ranging powers vested in the board by the company.

The duties of company's directors are broadly classified into two categories, namely; (i) general duties²⁹⁶ and (ii) statutory duties.

3.4.1 General Duties

The general duties of directors are of two broad kinds, to wit; the fiduciary duty of good faith and the duty of care and skill. Both kinds of duties have fundamental differences and have charted different evolutionary courses in history, the one deriving from Equity and the other from Common Law.²⁹⁷

3.4.1.1 Fiduciary Duty of Good Faith

Section 279 of the Act imposes on a company's director fiduciary obligations in his relationship towards the company; he is obliged to observe the utmost good faith towards

²⁹⁴ Section 264 CAMA.

²⁹⁵ Section 265 CAMA.

²⁹⁶ otherwise regarded as purely managerial duties.

²⁹⁷ See Oserheimen A. Osunbor (1992). The Company Director: His Appointment, Powers and Duties. In: Akanki E.O. (ed.). *Essays on Company Law*. Lagos. University of Lagos Press, page 130 at 140.

the company in any transaction with it or on its behalf. The fiduciary relationship of directors is owed with the company in two circumstances, namely: (a) where a director acts as an agent of a particular shareholder, and (b) where even though he is not an agent of any shareholder, such a shareholder or other person is dealing with the company's securities.

The company's directors when acting either individually or collectively as a board are enjoined to observe the following fiduciary duties.

- a. The duty of utmost good faith.²⁹⁸
- b. The duty to act in the best interest of the company as a whole.²⁹⁹
- c. The duty to exercise power for proper purpose and not for collateral purpose.³⁰⁰
- d. Duty not to fetter discretion.³⁰¹
- e. Duty to avoid conflict of interest.³⁰²

Directors are required to act at all times in what they believe to be the best interests of the company as a whole, so as to preserve its assets, further its business and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful as ordinary skillful director would act in the circumstance.³⁰³ Thus, in **Artra Industries Nigeria Ltd v. Nigerian Bank for Commerce & Industry**,³⁰⁴ the Supreme Court, while interpreting the scope of section 279(3) of the Act, held:

“In exercise of the management power and duties conferred upon them by S.63 (3) CAMA the directors of a company must adhere

²⁹⁸ Section 279(1) CAMA which now incorporates the principles in *Percival v. Wright* (1902) 2 Ch. 421 and *Re Smith & Fawcett Ltd* (1942) Ch. 304 .

²⁹⁹ Section 279(3). See also the cases of *Greenhalgh v. Ardenne Cinemas* (1951) Ch. 286 at 291 and *Parke v. Daily News* (1962) Ch. 927.

³⁰⁰ Section 279 (5). See also the cases of *Hogg v. Cramphorn* (1967) Ch. 254 and *Howard Smith Ltd v. Ampol Petroleum Ltd* (1974) A.C. 821.

³⁰¹ Section 279 (6); see also *Ringuet v. Bergeron* (1960) S.C.R. 672.

³⁰² Section 280 CAMA.

³⁰³ See section 279(3) CAMA. The test is a subjective one – the directors must act at all times in what they believe – not what the court may consider – is in the interests of the company. See *Re Smith & Fawcett Ltd* (1942) Ch. 304, per Lord Greene MR. However, the directors may still be held to have failed in this duty where they fail to direct their minds to the question of whether in fact a transaction was in the best interests of the company- see *Re W & M Roith Ltd* (1967) 1 WLR 432.

³⁰⁴[1998] 4 NWLR [PT.546] 375.

strictly to the statutory provisions which enjoin them to consider the interest of the company as paramount”.³⁰⁵

In the course of performance of their duties, directors are also enjoined to generally have regard to the interests of the company’s employees and members.³⁰⁶

Section 279(5) of the Act imposes a duty on directors to exercise their powers properly for the company, but not for collateral purpose.³⁰⁷ While in many instances an improper purpose is readily evident, such as when a director is looking to feather his or her own nest or divert an investment opportunity to a relative, greater difficulties arise where the director, while acting in good faith, is serving a purpose that is not regarded by the law as proper. The test is therefore to ascertain the controlling motive behind the director’s action.³⁰⁸ Directors are also required to exercise independent judgment. As trustees of the Company, directors can neither fetter their discretion in relation to the exercise of their powers, nor bind themselves to vote in a particular way, without the consent of the company as the beneficiary, at future board meetings.³⁰⁹ The directors are on a board to act in the best interests of the company as a whole, not to represent the interests of just one shareholder or even a group of like-minded investors. This rule applies irrespective of the circumstances in which a director has been appointed.

Consequently, a director cannot make a valid agreement among other directors or with shareholders or outsiders to vote in a particular way at board meetings. Any such agreement if at all made, even in good faith and for good motive, is invalid *ab initio*.³¹⁰

³⁰⁵ Per Syvester Umaru Onu, JSC (as he then was) at 382 Para. B .

³⁰⁶ Section 279 (4) CAMA. However, this provision seems more of a mere pious declaration as regards company’s employees, considering the express provisions of subsection (9) of section 279 CAMA which gives the company exclusive right to enforce the provisions of section 279; unlike members who can enforce the right of protection under sections 301, 303 and 311 CAMA, the employees cannot enforce the right to compel directors to accord any special consideration to their interest.

³⁰⁷ The power, if exercised for right purposes, does not constitute any breach of directors’ duty, even if a member of the company is incidentally affected adversely.

³⁰⁸ Nelson C. S. Ogbuanya (2010). *Essentials of Corporate Law Practice in Nigeria*. Lagos. Novena Publishers Ltd, page 338.

³⁰⁹ See Ss. 283 & 279 (6) CAMA.

³¹⁰ However, Ogbuanya is of the opinion that such arrangement can be made by the directors or Shareholders or a class of them in respect of general meeting. See Nelson C. S. Ogbuanya, op. cit. 338.

As fiduciaries, directors are strictly under a duty not to allow any personal interest to conflict with their duties as directors to the company.³¹¹ The law takes the view that good faith must not only be done, but must be manifestly seen to be done, and zealously patrols the conduct of directors in this regard; and will not allow directors to escape liability by asserting that their decision was in fact well founded. Accordingly, the director shall not, in the management of the affairs of the company, or in the utilization of the company's property, make any secret profit or achieve other unnecessary benefit.³¹²

Thus, any secret profit or unnecessary benefit made by a director contrary to the provision of the Act and in breach of the section is accountable to the company.³¹³ Similarly, company directors are not supposed to use their position as directors to involve in other things including business where they have personal interest.³¹⁴ Where, however, the company's Articles permits a director to contract with its company, such a director must disclose his interests in the proposed contract at the board meeting.³¹⁵ This duty of disclosure ensures fairness in the dealings. The director's declaration of interests in the proposed contract must be made at the board meeting at which the question of entering into the contract is first considered or if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the board held after he became so interested, and in a case where the director becomes interested in a contract after it is made, the said declaration must be made at the first meeting of the board held after he becomes so interested.³¹⁶ A director will however be liable and accountable for any profit

³¹¹ Section 280(1) CAMA. This rule is so strictly enforced that, even where the conflict of interest or conflict of duty is purely hypothetical, the directors can be forced to disgorge all personal gains arising from it – see *Aberdeen Ry v. Blaikie* (1854) 1 Macq HL 461, per Lord Cranworth.

³¹² Section 280 (2) CAMA.

³¹³ Section 280 (3) CAMA.

³¹⁴ By S.280 (4) CAMA, the inability or unwillingness of the company to perform any functions or duties under its Articles and Memorandum shall not constitute a defence to any breach of duty of a director under this Act.

³¹⁵ Section 277 CAMA.

³¹⁶ Section 277(2) CAMA. Failure to disclose interest as provided is an offence under S. 277(4) CAMA that could ground removal of the erring director.

made before declaring his interest.³¹⁷ Similarly, if a director makes a contract with the company and does not disclose his interest, that will constitute breach of trust.

Directors are equally prohibited from taking undue advantage of their position by entering into guarantee for loans to the director of the company or its holding company;³¹⁸ and making payments to a director of a company by way of compensation for loss of office or retirement unless disclosed to and approved by members of the company in general meeting.³¹⁹ By section 284 of the Act, a director is restricted from entering into an arrangement when such director is to acquire from the company or sell to it, non-cash asset of a requisite value without the approval by the resolution of the general meeting.

Directors also owe onerous and most challenging duty not to make secret profits and exploit corporate assets, information and opportunities. Section 280 of the Act bars directors from making any secret profit whereas section 287 (1) adds flesh to this expressly prohibiting directors from receiving bribes, gifts or commission, either in cash or kind from any person or a share in the profit of that person in respect of any transaction involving his company in order to introduce his company to deal with such a person, unless the gift is made in a form of unsolicited gift and as a sign of gratitude after the transaction has been completed, provided the director declares it before the board and ensures that the declaration and decision of the board approving his keeping the gift are entered in the minutes book of the directors.³²⁰

Directors like other officers of the company are duty-bound not to misuse corporate information, either during or after resignation, concerning any property, trade or secret entrusted in them by virtue of their position. The duty subsists even after resignation or

³¹⁷ S. 280(6) CAMA.

³¹⁸ S.270 CAMA.

³¹⁹ S. 273 CAMA..

³²⁰ See S. 287(3) CAMA. It should be borne in mind that what the law prohibits is the secrecy in the benefit; if due disclosure is made, the director would not be in breach of his duty towards the company – see *Regal (Hastings) Ltd v. Gulliver* (1942) 1 All ER 378.

termination of appointment and renders the directors accountable and liable to action for injunction and recovery of any secret profit or benefit made from misusing the information received by virtue of their previous position in the company.³²¹ It is immaterial that the company also benefited from the secret profit or that the gift was received in good faith³²² or that the director acted bona fide³²³ or that the company is unable or unwilling to perform any functions or duties under its Memorandum and Articles;³²⁴ even resignation by a director is also not an excuse for breach of duty.³²⁵ Hence, **Lord Denning MR in *Scottish C.W.S. Ltd v. Meyer***,³²⁶ while examining the onerous obligation of multiple directorship in competing companies stated that “a director holding interlocking directorships is walking a tight rope”.³²⁷

3.4.1.2 Duties of Care and Skill

The Nigerian Company law has significantly improved on the Common Law position on directors’ duty of care and skill. Unlike the subjective standard at Common Law as laid down **Per Romer J, in *Re City Equitable Fire Insurance Company***³²⁸ the Act has imposed on every director the objective professional standard to, in the exercise of powers and discharge of his official duty, observe care, diligence and skill in the degree expected of a reasonably prudent director in comparable circumstances.³²⁹ The standard of care imposed by the Act is the same for both executive and non-executive directors.³³⁰ By

³²¹ Ss. 287(2), 280 (3) & (5) and s. 281 CAMA.

³²² See S.287 (4) CAMA.

³²³ See *Regal (Hasting) Ltd v. Gulliver*, (1967) 2 AC 13.

³²⁴ S. 280 (4) CAMA.

³²⁵ S.280 (5) CAMA.

³²⁶ (1989) AC 324.

³²⁷ In this case, the nominee directors of a co-operative society were held to have conducted the company’s affairs in a manner oppressive to the minority by conducting the company’s business sluggishly to the benefit of the society’s competitors business.

³²⁸ (1925) Ch. 40, where it was held that a company’s director need not exhibit the performance of his duties with a greater degree of skill than may reasonably be expected from a person of his knowledge and experience nor bound to give continuous attention to the affairs of his company but may delegate his duties.

³²⁹ S.282(1) CAMA.

³³⁰ S. 282(4) CAMA.

implication, section 282(4) of the Act requires non-executive (outside) directors to be more proactive in the discharge of their duties.

As the Court of Appeal of New South Wales in Australia rightly observed in **Daniels v. Anderson**,³³¹ that the “concept of a sleeping or passive director has not survived and is inconsistent with the requirements of current company legislation”. The professional standard is in line with the enormous powers vested in the company director under section 63(3) of the Act.³³² This provision is clearly an invitation to the court to apply an objective standard to the conduct of directors in light of the peculiar circumstances of each case.³³³ Failure to take such reasonable care renders the director liable in an action for negligence and breach of duty.³³⁴

In **Delta Steel Nigeria Ltd vs. American Computer Tech Inc.**³³⁵ the court held that since the directors and managers control what the company does, the state of the mind of this special class of employees is the state of mind of the company, and thus the company is bound by the acts of its directors and managers.³³⁶

The directors must act in the best interest of the company which implies the interest of the present and future members of the company on the footing that company would be continued as going concern. Any provision in the company’s Articles or in any agreement that excludes the liability of the directors for negligence, default, misfeasance, breach of duty or breach of trust, is void. The company cannot even indemnify the directors against such liability.³³⁷

³³¹ (1995) 118 F.L.R. 248 (Austl.) at 310.

³³² See Nelson C. S. Ogbuanya, *op. cit.* 345.

³³³ Nigerian courts may be guided by the recent decision of the Supreme Court of Canada in *People Department Stores Inc. (Trustees of) v. Wise*, [2004] 3 S.C.R. 461 which emphasizes the objective component of the assessment of whether a director breached the fiduciary duty of care under Canada Business Corporations Act, R.S. 1985, c. C-44, s. 122(1)(b)

³³⁴ S. 282(2) CAMA. Specifically, it is no longer a defense to a claim of breach of the duty of care when a director was absent from meetings, because “the absence from the board’s deliberations, unless justified, shall not relieve a director from his or her responsibility for the actions of the board.” See section 283(3) CAMA.

³³⁵ [1999] 4 NWLR [PT.597].

³³⁶ See s.65 CAMA.

³³⁷ Sections 279(8) & 67 CAMA.

A director being an agent of the company is bound by the maxim '*delegatus non potest delegare*' and therefore must perform his functions personally. However, he may delegate his duty under certain conditions.³³⁸

Section 279 of the Act provides that where a director is allowed to delegate his powers under any of its provisions, such a director shall not delegate the power in such a way and manner as may amount to an abdication of duty.

3.4.2 Statutory Duties

Apart from the fiduciary duties and duties of care and skill which are well clearly spelt out by the Act, there are other numerous statutory duties which are imposed on company's directors. They include disclosure of director's shareholding,³³⁹ general duty to give notice of some personal matters,³⁴⁰ particulars of directors in trade catalogues, trade circulars, show-cards and business letters on which the company's name appears,³⁴¹ file return of allotment,³⁴² prepare and place at the annual general meeting along with the balance sheet and profit and loss account a report on the company's affairs including the report of the board of directors,³⁴³ make a declaration of solvency in the case of members' voluntary winding up,³⁴⁴ substantial property transactions involving directors³⁴⁵ and prohibition of secret payments, gifts or bribes to directors.³⁴⁶

It suffices to mention that the statutory duties of directors to keeping of registers and books of accounts, making returns to the Register of Companies, duties relating to meetings and notices as well as duties relating to prospectus, issue of shares. Some of

³³⁸ See Sections 64 and 263(5) CAMA and also Re City Equitable Fire Insurance Co (supra).

³³⁹ S.275 CAMA.

³⁴⁰ S. 276 CAMA.

³⁴¹ S.278 CAMA.

³⁴² Section 129 CAMA.

³⁴³ Sections 334(1) & 345(1) CAMA.

³⁴⁴ Section 462 CAMA.

³⁴⁵ Ss. 284 & 285 CAMA.

³⁴⁶ Ss.287 & 38(2) CAMA.

these duties are penal, others in addition to being penal create personal liability to third party, hence there are penalties for their breach. For this reason the statutory duties act as a powerful restraining influence on the activities of the directors.³⁴⁷

3.5 BREACHES OF DIRECTORS' DUTIES

It is imprudent as well as impossible to lay down any abstract definition of what a director's duties should be. The responsibilities of directors must vary with the nature of the company or their special position as defined by the Articles of Association. The matter complained of must be judged against the background of the realities of the case and a combination of circumstances may in one case constitute whilst in another fail to constitute a breach of duty. A conscious act of wrong doing as well as culpable and deliberate inadvertence to an obvious duty may so constitute a breach of duty and to this extent cases generically described as breaches of duty do fall within either the commission of a positive wrongful act or a remissness of a significant degree.³⁴⁸

Most of the powers of directors are 'powers in trust' and therefore should be honestly exercised in the best interests of the company and not in the interest of the directors or any section of members.³⁴⁹ Therefore, where a director acts dishonestly against the interest of the company, he will be held liable for breach of fiduciary duty.³⁵⁰

Similarly, directors are the trustees for the moneys and properties of the company handled by them, as well as exercise of the powers vested in them.³⁵¹ As such, if they dishonestly exercise their powers and perform their duties, they will be liable for breach of trust and

³⁴⁷ Ayua Ignatius, Op. cit. P.94.

³⁴⁸ Adebayo v. Johnson (1969) 1 All NLR 176, 186 per Coker, JSC (as he then was).

³⁴⁹ Ss. 279 (3) & (5) and 283 CAMA.

³⁵⁰ Fraser v. Whally (1864) 2 Hem. & M. 10; Piery v. Mills & Co. (1720 1 Ch. 77; Re Jermyn Street Turkish Baths, Ltd (1970) 3 All E.R. 57; Hogg v. Cramphorn Ltd (1966) 3 All E.R. 420; (1967) Ch. 254; and also Bamford v. Bamford (1969) 1 All E.R. 969; (1970) Ch. 212.

³⁵¹ S. 283 CAMA.

may be required to make good the loss or damage suffered by the company by reason of such dishonest acts.

They are also accountable to the company for any secret profits they might have made in the course of performance of duties on behalf of the company.³⁵² Directors can also be held liable for their acts of ‘misfeasance’ i.e., misconduct or wilful misuse of powers.³⁵³ Directors are also supposed to act within the parameters of the provisions of the Act, Memorandum and Articles of Association, since these lay down the limits to the activities of the company and consequently to the powers of the board of directors. Likewise, the powers of directors may be limited in terms of specific restrictions contained in the Articles of Association. The directors shall therefore be held personally liable for acts beyond the aforesaid limits, being ultra vires the company or the directors.

In the same vein, directors are required to, in exercising their powers and discharging their duties to the company, exhibit reasonable skill and care as expected of them as prudent businessmen. They shall therefore be deemed to have acted negligently in discharge of their duties and consequently be liable for any loss or damage resulting there from.

3.6 LIABILITIES AND SANCTIONS FOR BREACHES OF DIRECTORS’ DUTIES

It is generally expected that since directors’ acts are regarded and treated as those of the company itself,³⁵⁴ the responsibilities for their actions as a board ought to be collective. However, the law in certain instances will hold every director individually responsible for

³⁵² Ss.287(2), 280(3) & (5) CAMA.

³⁵³ Section 279 (5).

³⁵⁴ See s.65 CAMA.

actions of the board in which he participated and shall not, unless justified, be relieved of such responsibility for reason of absence from the board's deliberation.³⁵⁵

Thus, directors will be personally liable in damages for failure to state any particular facts or misstatement of facts in the company's prospectus. With regard to allotment, directors may incur personal liability for irregular allotment; failure to repay application monies in case of minimum subscription having not been received the stipulated period of issue; or for failure to repay application monies when application for listing of securities is not made or refused.³⁵⁶

Directors in their capacity as officers will be personally liable for failure to file the return of allotment with specified particulars within the stipulated time.³⁵⁷

Directors will also be held personally liable where their liability is made unlimited in pursuance of section 289 of the Act. It is provided in section 288 of the Act that in a limited liability company, the liability of the directors, managers or managing director may be unlimited if so provided in the memorandum of association. Where the articles so authorise, such a company may be by special resolution render the liability of its directors, managers or managing director unlimited.

Similarly, directors may be made personally liable for the debts or liabilities of a company by an order of the court under section 507 of the Act.³⁵⁸ Such an order shall be made by the court where the directors have been found guilty of fraudulent trading.³⁵⁹

³⁵⁵ Ss. 66 and 282(3) CAMA. There is no distinction between the level of standard of care and skill being exercised by executive and non-executive directors in respect of responsibility for breaches of duties – section 282(4) CAMA.

³⁵⁶ Section 63(1) Investment and Securities Act, No. 45, 1999. See also the case of *S.E.C. v. Osindero Oni & Lasebikan* (2009) 5 NWLR (Pt. 1134) 377.

³⁵⁷ Section 129 CAMA.

³⁵⁸ CAMA.

³⁵⁹ Section 290 CAMA. The provision of section 290 is apparently intended to deal with the rampant complaints about directors who obtain loans or advances on behalf of the company for specific projects and divert them to their personal use. See also the case of *PFS Ltd v. Jefia* (1998) 3 NWLR (Pt.543) 602, where it was held that every director or officer of the company is personally liable to the party defrauded under section 290 CAMA.

Section 506 of the Act, in this regard, provides that if in the course of the winding up of a company, it appears that any business of the company has been carried on in a reckless manner or with intent to defraud creditors of the company or creditors of any other person for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on business in the manner aforesaid shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.³⁶⁰ Directors may also be personally liable where they knowingly and wilfully authorise or permit commencement of business of the company without first of all affixing or engraving the name of the company outside every of its office or on its common seal, respectively, or mentioning the company's name in all Bills of Exchange, business letters, notices, advertisements and official publications.³⁶¹ Similarly, a director may be personally liable where the company carries on business without having at least two members³⁶² or without having at least two directors.³⁶³

If the company carries on business for more than six months after the membership has fallen below two, every director or other officer who knows that it so carries on business is liable jointly and severally with the company for the debts of the company contracted during that period.³⁶⁴ With regard to the number of directors, section 246(3) of the Act provides that a director or member of a company who knows that the company carries on business after the number of directors has fallen below two for more than sixty days is liable for all liabilities and debts incurred by the company during that period.

³⁶⁰ See also section 505 CAMA.

³⁶¹ S.548(2) CAMA. See also the case of *British Airways Board v. Parish* (1979) 2 Lloyd Rep. 361.

³⁶² Section 93 CAMA.

³⁶³ Section 246 CAMA.

³⁶⁴ Section 93 CAMA.

Directors are generally entitled to remuneration and other payments out of the fund of the company. The remuneration of directors is apportionable but a director, who receives more money than he is entitled to, shall be guilty of misfeasance and be accountable to the company for such money.³⁶⁵ Section 390(7) of the Criminal Code Act provides that any director or officer of a company who steals company funds is guilty of a felony and liable to imprisonment for seven years.

By section 128(2) of the Act, any director of a company who knowingly contravenes or permits or authorizes the contravention of any of the provisions of the Act with respect to allotment shall be liable to pay compensation to the company and the allottee, respectively, for any loss, damages or costs thereby sustained or incurred. Similarly, all directors who knowingly pay, or are party to the payment of dividend out of capital or otherwise³⁶⁶ in contravention of the Act shall be personally liable jointly and severally to refund to the company any amount so paid.³⁶⁷

Other provisions of the Act prescribing offences and penalties for erring directors include section 348 for laying a faulty financial statement before any meeting of shareholders; section 502 for officers of a company in liquidation antecedent to or in the course of winding up. Section 503 of the Act also prescribes penalty for falsification of company books; section 504, for frauds while section 505 prescribes the liability for not keeping proper accounts. Section 507 prescribes the power of law courts to assess damages against delinquent directors while the prosecution of delinquent officers and members of the company is provided for in section 508 of the Act.

³⁶⁵ Section 267 CAMA.

³⁶⁶ By section 379(5) of the Companies and Allied Matters Act, dividends are payable to shareholders only out of the distributable profits of the company such as profits arising from the use of the company's property, revenue reserves, realized profit on a fixed asset sold or the net realized profit on the assets sold – see section 380 CAMA.

³⁶⁷ Section 386 CAMA. Such directors shall have the right to recover the dividend from shareholders who receive it with knowledge that the company had not power to pay it – see subsection (2) of section 386 CAMA.

Section 279 (8) of the Act prohibits insertion or inclusion in the Articles of Association, resolution or contract, or any form of exemption from liability to a director, for any breach of his duties.³⁶⁸

3.7 REMEDIES FOR BREACHES OF DIRECTORS' DUTIES

The law provides for a variety of remedies in the event of a breach by the directors of their duties. Firstly, the company itself can bring a claim against the erring director if it can show that it has suffered some loss.

Thus, the following remedies are available to the company, to wit;

- a. Summary dismissal/Termination or removal;
- b. Injunction or declaration;
- c. Damages or compensation;
- d. Rescission of the relevant contract and restoration of the company's asset if the same is traceable; and/or;
- e. Account for profits.

Section 279(9) of the Act expressly stipulates that any duty imposed on directors shall be enforced against the director by the company.³⁶⁹ Claims by a company are often retrospective in the sense that they can be brought by members of the existing board against their predecessors.³⁷⁰ Errant directors can also face claims against them when a company is sold. The new 'owners' may appoint new directors and, if things go wrong, they may cast around for past breaches of duty and the opportunity to hold the old directors to account.

³⁶⁸ See also section 67 CAMA.

³⁶⁹ See also section 299 CAMA and the case of *Foss vs. Harbottle* (1843) 2 Hare 461.

³⁷⁰ It is, after all, very unlikely that a board will choose to sue itself; turkeys don't vote for Christmas.

Claims can equally be made by a liquidator or administrator. Once a company becomes insolvent, a liquidator or administrator, as the case may be, will be under a duty to consider a claim against a director where a breach of duty is discovered. A claim will be treated as an asset of the company; it would be pursued and realised for the benefit of creditors.

The provision of section 279(9) of the Act is applied subject to the exceptions under section 300. Thus, shareholders can bring a claim against a director in the name of the company to recover the company's loss.³⁷¹ Whatever the circumstances, regardless of who is in the right and whether or not there has been a breach of duty, shareholders always have the right to remove a director by ordinary resolution. That a right is enshrined in statute and cannot be taken away by a company's Articles.³⁷²

One of the most important aspects of corporate share ownership is the payment of dividends. Dividends are payable only out of profits. In other words, dividends cannot be paid out of issued capital and contravention of this principle will make director personally liable.³⁷³

³⁷¹ Section 63 (5)(b) CAMA. The shareholders are not claiming in their own names for their own loss; rather, they are claiming in the company's name for the company's loss. It follows that any sum recovered goes to the company: and it will be the board's decision whether to pass the benefit on to shareholders by way of dividend.

³⁷² Section 262 CAMA. The director's employment right will, however, be unaffected by the shareholder vote; the company will have to pay out for any notice period agreed under the director's service contract. By section 262 (6) CAMA, a director removed is entitled to compensation and damages payable to him in respect of the termination of his appointment as a director. Section 291 CAMA provides that where director's contract of employment is more than five (5) years, such employment cannot be terminated except under specified circumstances.

³⁷³ See Section 386 CAMA.

3.8 DEFENCES AGAINST LIABILITY FOR BREACHES OF DIRECTORS' DUTIES

Directors are exempted from liability in the following instances.

Firstly, when a director contracts as agent on behalf of the company, like any other agent, he is not personally liable on the contract except where he contracts in such a way as to assume personal liability.³⁷⁴

Generally, it has been said that any director who personally commits a fraud or any other tort in the course of his duties is liable to the injured party. This is upon the basis that whoever commits a wrong is personally liable for it, even if he acts as an agent or servant on behalf, and for the benefit of another.³⁷⁵

However, with regard to torts resulting from imprudent exercise of powers, directors are not personally liable “unless the imprudence is so great and so manifest as to amount to negligence, and the court will not visit directors with the consequences of a mere error of judgment when they have acted in good faith and have intended to do what was right and best for the interest of the company”.³⁷⁶

Secondly, a director is relieved of liability under section 280 (1) and (2) of the Act if he properly declares interest or a gift is made in accordance with the provisions of sections 277 and 280(6) of the Act, respectively. That is, where a director discloses his interests before the transaction and before the secret profits are made before the general meeting, which may or may not authorise any resulting profits, he may escape liability, but shall be

³⁷⁴ See Palmer's Company Law, paragraph 62-02, page 922 referred by Orojo J.O. (2008). *Company Law and Practice in Nigeria* (5th ed.) page 271.

³⁷⁵ See Palmer's, op. Cit. paragraph 64-06, page 972.

³⁷⁶ Parker, G., Buckley, M and Sir Walton (1981). *Buckley on the Companies Act* (14th ed.) at page 867.

liable and account for every secret profit made if he discloses interests only after he has made the secret profits.

Similarly, even where a director's breach of duty is clear, the shareholders can ratify it after the event by passing an ordinary resolution. The members in general meeting are empowered to ratify or confirm any action taken by the board of directors.³⁷⁷ Section 66(1)(a) of the Act provides that a company is bound by the act of its officer or agent not only where he is expressly authorised but equally so where the authorization is implied. In as much as a company director is not expected to abdicate his responsibility, he is however entitled to rely on the judgments of responsible assistants with the requisite knowledge, training and expertise and also to assume that qualified staffers are performing the duties of their offices with competence.³⁷⁸ Section 279(5) of the Act imposes a duty on directors to exercise their powers properly for the company, but not for collateral purpose. However, the power, if exercised for right purposes, does not constitute any breach of directors' duty, even if a member of the company is incidentally affected adversely.

Similarly, a director is not bound to give continuous attention to the company's affairs. His duties are of intermittent nature to be performed at periodical board meetings, and at any meetings of any committee of the board upon which he happens to be placed. He 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.³⁷⁹ In respect of duties that, having regard to the exigencies of business and the articles of association, may properly be left to some others. In the same vein, a director who has not authorised nor discovered a fraud committed by his co-directors where there are no circumstances to put him on inquiry

³⁷⁷ Sections 63(5)(c) and 66(2) CAMA.

³⁷⁸ See *Adebayo v. Johnson* (1969) 1 All NLR 176, 192 per Coker JSC.

³⁷⁹ *Re Brazilian Rubber Plantation Estate Ltd* (supra).

cannot be held responsible for it.³⁸⁰ However, he will not be exonerated from liability if his lack of knowledge is as a result of absence from the board's meeting without justification.³⁸¹

Section 558 of the Act gives the court power to grant relief to officers of a company in certain circumstances and by section 567(1) of the Act, a director is an officer of the company. Therefore, a director in breach of a duty may be relieved of any liability if he can convince the court that he acted honestly and reasonably in all the circumstances. This might happen where a director acted in good faith even if the acts were ultra vires, provided the director reasonably believed them to be intra vires,³⁸² but a director of a company who deals with legal matters without seeking legal advice at all and prefers to deal with the matter himself without proper consideration cannot be said to have acted reasonably.³⁸³

Section 284 of the Act expressly prohibits arrangement with a company by a director of the company or its holding or a person connected with him for the acquisition of non-cash assets of requisite value of another company or its holding in which such a director or the person connected with him has pecuniary interest, unless such arrangement is first approved by a resolution of the company in general meeting, will render the director and the person so connected, and any other director of the company who authorises the arrangement or any transaction entered into contravention thereof guilty and liable to account for the proceeds thereof.³⁸⁴ However, such a director will be exonerated from liability if he can show that he took all reasonable steps to secure the company's

³⁸⁰ *Cargil v. Bower* (1878) 10 Ch.D 502; *Dovey v. Cory* (1901) AC 477.

³⁸¹ Section 282 (3) CAMA.

³⁸² *Re Claridge's Patent Asphalt Co* (1921) Ch 543.

³⁸³ For instance, it was decided in *Re Duomatic Ltd* (1969) 2 Ch. 365 that in respect of the settlement of a possible legal claim against the company a reasonable director would normally take professional legal advice.

³⁸⁴ Section 286(3) CAMA.

compliance with section 284,³⁸⁵ or that at the time the arrangement was entered into, he did not know the relevant circumstances constituting the contravention.³⁸⁶

In practical terms, therefore, the final decision on the extent of a director's duties over the whole range of his activities is left to the discretion of the court, which is thus able to make a clear distinction between the conduct to be expected of full-time (executive) and of part-time (non-executive) directors, and to lay down more general standards of a business practice and morality. Directors need not wait for proceedings against them before seeking the court's protection. They can bring their own action for a court order to exempt them from liability.

It should be noted that the inability or unwillingness by a company to perform its functions or duties is not a defence to any breach of duty by the director.³⁸⁷

³⁸⁵ Section 286(5) CAMA.

³⁸⁶Section 286(6) CAMA.

³⁸⁷ S. 280 (4) CAMA. See also *Regal (Hastings) Ltd v. Gulliver* (1942) 1 ALL E.R. 378; (1967) 2 AC 134 and *Canadian Aero Service v. O'mally* (1973) 40 D.L.R. (3d) 371

CHAPTER FOUR

CODES OF CORPORATE GOVERNANCE FOR COMPANIES IN NIGERIA

4.1 INTRODUCTION

Corporate failures are hardly a new story. Indeed, states and economies have failed in the past, and many more are failing. However, the magnitude of corporate failures and the extensiveness of their impact have made them part of the several issues hotly debated in contemporary corporate and political governance scholarship.¹

The corporate scandals² of the 1990s generated a lot of concern across the globe over the apparent lack of accountability on the part of powerful board of directors and chief executives of companies. It was realized that the existing legal, institutional and regulatory framework were inadequate to meet the challenges posed to corporate governance. Consequently, the national governments and international institutions decided to take further initiatives in ensuring that basic corporate cultures are evolved for companies operating within their respective jurisdictions. Anglo-Saxon countries reacted first to the growing interest in corporate governance codes. The Cadbury Report issued in 1992 in the United Kingdom,³ superseded by the Combined Code introduced by the London Stock Exchange in 1998, has been highly influential and has paved the way for the adoption of

¹ See Jean Cartier-Bresson (2000). The Causes and Consequences of Corruption: Economic Analyses and Lessons Learnt. In: *Org. For Econ. Co-Operation And Dev., No Longer Business As Usual: Fighting Bribery And Corruption* 11, 12. Discussing agency problems in the political governance context, the author said: "Opportunities for corruption depend on the size of the rents in the control of public agents, the discretion they have in allocating them, and their lack of a sense of accountability to society".

² See for instance, the several scandals which rocked the corporate environment ranging from the Polly Peck scandal which landed the mega company into instant receivership, the collapse of the Bank of Credit and Commerce International which ruined many Asian shopkeepers in Britain, the Robert Maxwell scandak, the Allied Lyons problem and the Queen Moat Houses collapse - one of the largest hotels organization in the United Kingdom and the Bank of Barring collapse, and the Enron and Worldcom scandal in the United States on fraudulent accounting practice, etc.

³ See Report of the Comm. on The Fin. Aspects Of Corporate Governance (Burgess Sci. Press 1992), available at <http://www.ecgi.org/codes/documents/cadbury.pdf> [hereinafter CADBURY REPORT].

corporate governance codes or guidelines in various countries, including the 1999 Blue Ribbon Report in the United States.⁴

More recently, the Sarbanes-Oxley Act, passed in July 2002 in the United States in response to the wave of America corporate scandals, has introduced drastic disclosure requirements and far-reaching rules of governance.⁵

Corporate governance has only recently become a major issue in Nigeria. In 2003, Nigeria's Corporate Affairs Commission and Securities and Exchange Commission launched the Code of Best Practices on Corporate Governance for publicly quoted corporations in Nigeria. This Code was reviewed in September, 2008 by a National Committee chaired by Mr. M.B. Mahmoud and produced as a new Code in April 2011.

Similarly, in 2006, the Central Bank of Nigeria, introduced its own Code of Corporate Governance to serve as guidelines for all banks operating in Nigeria. The Code is known as the Central Bank of Nigeria Code for Corporate Governance for Banks in Nigeria Post Consolidation, 2006. It was released on 1st March, 2006 but became effective from April 3, 2006.⁶ The Code, according to Central Bank of Nigeria, was developed to complement existing codes in the country, and compliance to it is mandatory for all banks.

The purpose of this chapter is therefore to briefly examine the relevant provisions of these two Codes of Corporate Governance and their impact on corporate management in Nigeria.

⁴ The Vienot Reports issued in 1995 and in 1999 in France or the Kodex Code adopted in February, 2002 in Germany, following previous initiatives, are other examples.

⁵ Many of the Act's requirements will still be implemented by means of the SEC's rule-making procedures. The SEC, however, has already passed a rule confirming that CEOs and CFOs of all US listed companies shall swear to the accuracy of their annual financial statements.

⁶ This is in a bid to address some corporate challenges in the banking industry.

4.2 CODE OF CORPORATE GOVERNANCE BY SECURITIES AND EXCHANGE COMMISSION

This Code was first introduced in 2003 at the instance of the Securities and Exchange Commission and the Corporate Affairs Commission with the desire to meet the international standards of best corporate practices. The two regulatory bodies for companies in Nigeria had, on 15th June, 2000, inaugurated a 17 member committee⁷ with mandate to, among other things; identify weakness in the current corporate governance practice in Nigeria and also to fashion out necessary changes that will improve the corporate governance. Membership of the committee was carefully selected to cut across all sectors of the economy including members of professional organizations, private sector and regulatory agencies.

The terms of reference of the committee are:

1. To identify weakness in the current corporate governance practices in Nigeria with respect to public companies;
2. To examine practices in other jurisdictions with a view to the adoption of international best practices in corporate governance in Nigeria;
3. To make recommendations on necessary changes to current practices; and
4. To examine any other issue relating to corporate governance in Nigeria.

The committee's draft code on corporate governance was published in newspapers and later reviewed at three locations in Lagos, Abuja and Port Harcourt. The aim of the publication and the review was to facilitate stakeholders input before the code was finalized. The final report was approved by the board of Securities and Exchange

⁷ Headed by Atedo Peterside.

Commission and Corporate Affairs Commission as the Code of Best Practices for Corporate Governance in Nigeria. The Code was adopted in 2003.

Subsequently, in September 2008, the Securities and Exchange Commission inaugurated another Committee under the Chairmanship of Mr. M.B. Mahmoud to address the weaknesses in the 2003 Code and to improve on the mechanism for its enforceability. Specifically, the Committee was given the mandate to identify weaknesses in, and constraints to, good corporate governance; examine and recommend ways of effecting greater compliance; advise on other issues that are relevant to promoting good corporate governance practices in Nigeria, and for aligning the Code with international best practices. This review gave birth to the Code of Corporate Governance for Public Companies in Nigeria, 2011. The Code is a set of recommendations primarily designed to entrench good business practices and standards for public companies in Nigeria, including banks.⁸

4.2.1 Main Features of the Code

The Code focuses on the following key areas, namely:

1. The board of directors; its responsibilities, structure and procedures;
2. The Shareholders' rights and privileges, and
3. The Audit Committee.

4.2.2 Composition and Responsibilities of the Board of Directors

The Code of Corporate Governance, 2011 provides for the responsibilities and functions of the board. The board has the responsibilities for directing the affairs of the company in a lawful and efficient manner and to ensure that the company continues to improve its

⁸ See Part A, section 1 of the Code.

value creation as much as possible and also that the value being created is shared among the shareholders and employees with due regard to the interest of the other stakeholders of the company. The Code lists the specific functions of the board to include strategic planning, selection, training, performance appraisal and compensation of senior executives, succession, planning; effective communication with shareholders, ensuring the integrity of financial controls and reports; and ensuring that ethical standards are maintained and that the company complies with the laws of Nigeria.⁹The board is to determine the extent to which its duties and responsibilities should be undertaken through committees, the number and composition of such committees. The board is also responsible for effective functioning of the various committees.¹⁰ In discharging its functions, the board may delegate any of its duties or authorities to the management but only in such a manner as not to, in any way, diminish its overall responsibility of ensuring effective performance of the company.¹¹

The Code made some slight amendments to the 2003 Code. Thus, unlike the 2003 Code which puts the maximum number of members of the board at fifteen (15), the 2011 Code is silent on the maximum number.

The Code recommends a board size of not less than five (5) members, with a mix of executive and non-executive, and at least an independent director. The provision of the minimum number of five (5) board members is a significant improvement to the statutory minimum of two (2) contained in section 246 of the Companies and Allied Matters Act¹². It emphasises that the board should, as much as possible, be composed in such a way as to ensure diversity of experience without compromising compatibility, integrity, suitability and independence.

⁹ See section 3 of the Code.

¹⁰ Section 9.1 of the Code.

¹¹ Section 2.4 of the Code.

¹² Cap. C20 LFN, 2004.

The Code further recommends that the board should be independent of management to ensure objective and effective discharge of their oversight function.¹³ Accordingly, the positions of the Chairman of the board and Chief Executive Officer should be clearly separated and held by different persons. This is also to avoid over-concentration of powers in one individual.¹⁴

There is no limit as to number of concurrent directorship to which a director of a company may hold. However, it is recommended that a prospective nominee for appointment to the board of a company should disclose memberships on any other board.¹⁵ Secondly, directors should not be members of boards of other companies in the same industry to avoid conflict of interest, breach of confidentiality and misappropriation of corporate opportunity.¹⁶ Similarly, cross membership is generally discouraged and must be disallowed where it will lead to conflict of interest between boards of competing companies.¹⁷ This is to safeguard the objectivity and independence of the board.

Furthermore, directors should promptly disclose any real or potential conflict of interest that they may have regarding any matter that comes before the board or its committees. Accordingly, a director should abstain from discussions and voting on any matter in which the director has or may have a conflict of interest. Disclosure by a director of a real, potential or perceived conflict of interest or a decision by the board as to whether a conflict of interest exists should be recorded in the minutes of the meeting.¹⁸

The Code adopts international best practice on the holding of board meetings. In order to maintain effective control over the company and monitor management, the board should

¹³ Section 4.5 of the Code.

¹⁴ Section 5.1(b) of the Code.

¹⁵ Section 6.1(a) of the Code.

¹⁶ Section 6.1(d) of the Code.

¹⁷ See section 7 of the Code.

¹⁸ See section 16.1 (a), (b) and (f) of the Code.

meet regularly at least once in quarter with adequate notice and agenda given to the directors. Each director is required to attend not less than two-thirds of all board meetings and such attendance is used among other criteria for re-nomination of a director to the board.¹⁹ This rule is designed to prevent the continued existence of dormant directors who are merely interested in the profit of a company but less interested in its governance and management. Directors should also have access to independent professional advice if necessary, at the expense of the company. More importantly, all directors should have access to the advice and services of the company secretary.

The officers of the board, as listed in the Code, include the Chairman, Chief Executive Officer/Managing Director, Executive Directors, Non-Executive Directors and Independent Directors.

The Chairman's primary responsibility is to ensure effective operation of the board and, as much as possible, maintain a distance from the day-to-day operations of the company which should be the primary responsibility of the Chief Executive Officer and the management team.²⁰

It is apparent that the positions of the Chief Executive Officer and Managing Director are fused and held by one individual as the head of the management team. The Chief Executive Officer/Managing Director should, among other things, be industrious, credible and possess integrity as well as knowledgeable in relevant areas of the company's activities. He is responsible for day-to-day smooth operation of the company. The Code recommends that the terms and conditions of service of the Chief Executive Officer/Managing Director should be clearly and adequately spelt out in the letter of appointment. Similarly, the Chief Executive Officer/Managing Director should be given

¹⁹ Section 12 of the Code.

²⁰ See section 5.1 of the Code.

some remuneration as a related component for a long-term performance which may include stock options and bonuses but should not be personally involved in the determination of the same. Such remuneration should be disclosed in the company's annual reports.

Other officers of the board include the executive and non-executive directors. The Code clearly spells out the working relationship between the two, while outlining the distinction between them. This is a welcome development as it tends to clarify a confusion which may otherwise arise from a shadow interpretation of the Supreme Court's sound reasoning in **Longe v. First Bank of Nigeria Plc**²¹ that executive and non-executive directors are both directors of company under the law as the Companies and Allied Matters Act²² has not made a distinction between them. Like the Chief Executive Director, the executive directors are the heads of their various departments and accordingly should be persons of relevant experiences in their respective areas of corporate assignments. They are to be involved in the day-to-day operations and management of the company. They should not be involved in the determination of their remuneration and also not entitled to sitting allowances or other directors' fees paid to non-executive directors. Their remunerations which are determined by non-executive directors should be disclosed in the company's annual reports.

The non-executive directors, on the other hand, are key members of the board with broad experience, integrity and credibility. The Code recommends payment of sitting allowances to non-executive directors. The non-executive directors should be truly independent so as to bear on issues of strategy, performance, resources, including key appointments, and standard of conduct. They should not depend on the company for their income other than

²¹ (2010) 6 NWLR (Pt. 1189) 1.

²² Cap. C20, LFN, 2004.

their director's fees and allowances and should not be involved in business relationship with the company that could fetter or encumber their independent judgment. They should also not participate in share option schemes with the company nor be pensionable by the company. The appointment of the non-executive directors should be for a specific period and it should be a matter for the entire board. There should be a defined formal and transparent selection process to the board of directors and re-appointment should be based on performance.

Newly appointed directors should undergo proper company and board orientation and where necessary be given formal training at the company's cost aimed at making them effective in the discharge of their duties.²³

In line with the provision of section 281 of the Companies and Allied Matters Act,²⁴ multiple and concurrent directorship is preserved in the code. However, this is not without certain qualifications and restrictions. The Code provides that concurrent service on too many boards of different companies may interfere with the discharges of a director's responsibility and that this factor should be taken into consideration. There is also the duty of disclosure on the part of a prospective nominee who is serving on the board of another company. The board then has a duty to consider whether the other directorship held by such a prospective nominee can affect the discharge his duties and responsibilities. Quite categorically, the Code provides that directors should not be members of boards of other companies in the same industry. This is to avoid a conflict of interest, breach of confidentiality and a misappropriation of corporate opportunity.

²³ Sections 5.1(d)(ix) and 18.2 of the Code.

²⁴ Cap. C20, LFN, 2004.

4.2.3 Remuneration and Compensation

The Code provides for remuneration, benefits and compensation to be paid to directors and other senior management of the company. While the executive directors are entitled to receive remuneration, the non-executive directors are entitled to be paid compensation²⁵ and other benefits. Such remuneration may include stock options and bonuses.²⁶ The Code further recommends for companies to develop a comprehensive policy on remuneration for executive directors and senior management which should be approved by the board generally but in the case of remuneration for the executive directors, the approval is by a committee made up of wholly non-executive directors.²⁷ The levels of the remuneration should be such sufficient as to attract, motivate and retain skilled and qualified persons needed to successfully run the company.

Compensation for non-executive directors should be fixed by the board and approved by shareholders in a general meeting.²⁸ The company's remuneration policy and all material benefits and compensation paid to directors should be published in the company's annual reports.²⁹

4.2.4 Shareholders Right and Privileges

The Code makes a number of recommendations to facilitate the exercise of shareholders' statutory rights as provided for in the Companies and Allied Matters³⁰ and the Articles of Association. The Code gives shareholders the responsibility of electing directors of the company who, in turn, have the duty of ensuring that the shareholders' rights and privileges are fully protected at all times. Moreover, the board is to ensure equal treatment

²⁵ This includes sitting allowance and fees.

²⁶ Sections 5.2(g) and 5.3(d) of the Code.

²⁷ Sections 14.3. Section 5.3 (c) of the Code prohibits executive directors from involvement in the determination of their remuneration.

²⁸ Sections 5.3(d) and 14.10.

²⁹ Section 14.6 of the Code.

³⁰ Cap. C20, LFN, 2004.

of shareholders and that no shareholder, however large, is given preferential treatment or superior access to information or other materials.³¹ Similarly, the board should ensure that the company promptly renders to shareholders documentary evidence of ownership interest in the company such as share certificates, dividend warrants and related instruments. Where these are rendered electronically, the board should ensure that they are rendered promptly and in a secure manner.³²

The Code further states that companies should ensure that the shareholders' meeting is used as a forum for communication so that it is well informed in fulfilling its function as the highest corporate authority. It encourages companies to increase the shareholders' ability to put items on the agenda of the meeting and to facilitate motions concerning those items. Thus, the Code provides that the venue of a general meeting of shareholders should be carefully chosen in such a way as to make it possible and affordable, in terms of distance and cost, for the majority of the shareholders to attend and vote; not to disenfranchise shareholders on account of choice of venue, which is unreasonable and impracticable to reach.³³ Notice of meeting should be sent at least twenty-one (21) working days before the meeting with such details and other information as will enable them to vote properly on any issue.³⁴ The board should propose a separate resolution at the general meeting on each substantial issue in such a way that they can be voted for in an organized manner. The board should also ensure that decisions reached at general meetings are properly and fully implemented.³⁵

Shareholders, especially institutional shareholders, are therefore encouraged to familiarise themselves with the letter and spirit of the Code in order for them to be able to encourage

³¹ See sections 21.2, 22 and 35.4 of the Code.

³² See section 22.4 of the Code.

³³ See section 23 of the Code.

³⁴ Including annual report and audited financial statements.

³⁵ Section 25 of the Code.

or whenever necessary, demand compliance with the principles and provisions of the Code, including those pertaining to their rights.³⁶

4.2.5 The Audit Committee

The Code recognizes the importance of the Audit Committee in ensuring objectivity. Effective Audit Committee provides assurance to the shareholders that the auditors, who act on their behalf, are in a position to, and do safeguard their interests indeed.

In relation to the role of auditors, the Code, in Part E, states that companies should establish Audit Committee in line with section 359 (3) and (4) of the Companies and Allied Matters Act³⁷ with the objective of raising the standard of corporate governance. The board has the responsibility for ensuring that the committee is constituted in the manner stipulated and is able to effectively discharge its statutory duties and responsibilities. Accordingly, members of the committee should be persons with basic financial literacy and ability to read financial statements.³⁸

Despite the imperative of setting up of Audit Committee compulsorily in public companies, the membership has been statutorily fixed, such that the members do not have a higher opportunity of checkmating management by numerical strength in the committee. Section 359(4) of the Companies and Allied Matters Act,³⁹ provides that the Audit Committee shall consist of an equal number of directors and representatives of shareholders of the company subject to a maximum of six members. At least one board

³⁶See section 1.3(b) of the Code.

³⁷Cap. C20, LFN, 2004. Section 359 (3) of the Act provides that every public company must have an audit committee and the auditor shall make a report to the committee, whereas subsection (4) requires that the committee shall consist of equal number of directors and representatives of the shareholders of the company, subject to a maximum number of six members and shall examine the auditors' report and make recommendation thereon to the annual general meeting.

³⁸ See section 30.1 & 2 of the Code.

³⁹See section 359(5) Companies and Allied Matters Act, 2004. There seems to be a conflict here between section 359(4) of the Act and the Code in section 9.4 which provides that only directors should be members of the committees, including the audit committee, to be established by the board. The senior management who may only attend meetings are not members of the committees. The provisions of the Act prevail in view of section 1.3 (e) and (g) of the Code to the effect that they shall be some other persons on audit committee in addition to board members.

member of the committee should be financially literate.⁴⁰ Nomination of a shareholder as member of the committee may be made by a member giving notice of such nomination to the company secretary at least 21 days before the annual general meeting.⁴¹

The principal duty of the committee is to examine the auditor's report and make recommendations thereon to the annual general meeting as it may think fit.⁴² Section 359(6) of the Act sets out more particularly the objectives and functions of the committee as follows, to wit:

1. Ascertain that the accounting and reporting policies of the companies are in accordance with legal requirements and agreed ethical practices;
2. Review the scope and planning of audit requirements;
3. Review the findings on management matters in conjunction with the external auditors and departmental responses thereon;
4. Keep under review the effectiveness of the company's system of accounting and internal control;
5. Make recommendations to the board in regard to the appointment, removal and remuneration of the external auditors of the company; and
6. Authorize the internal auditors to carry out investigations into any activities of the company which may be of interest or concern to the committee.

In addition to its statutory functions,⁴³ the committee should be responsible for ensuring quality assurance with regard to external auditors and internal control,⁴⁴ as well as to the

⁴⁰Section 30.2 of the Code.

⁴¹Section 359(5) CAMA.

⁴²Section 359(4) CAMA.

⁴³Contained in section 359 CAMA.

⁴⁴In particular, risk management and legal compliance.

annual and interim financial statements intended for publication.⁴⁵ The Code is generally made subject to, and designed to supplement the provisions of the Act.

4.3 CODE OF CORPORATE GOVERNANCE FOR BANKS BY CENTRAL BANK OF NIGERIA

The Central Bank of Nigeria, in March 2006, enacted a Code of Corporate Governance for banks in Nigeria following the consolidation of the banking industry. Before the consolidation exercise, the Nigerian banks were very weak with poor corporate governance, and this affected customers' confidence in banking operations.⁴⁶ The Central Bank of Nigeria had noted, among other things, that "poor corporate governance was identified as one of the major factors in virtually all known instances of a financial institution's distress in the country."⁴⁷ Some of the challenges which the Code identifies include technical incompetence of board and management; boardroom squabbles among directors; squabbles among staff and management; inadequate robust risk management system; malpractices and sharp practices; insider abuses; rendering of false returns and concealment of information from examiners; ineffectiveness of board/statutory committees; and inadequate operational and financial control, etc.⁴⁸

The Code, in fact, seeks to address these major challenges and develop a sound banking system in the country.⁴⁹ It was also developed to, according to the Central Bank of Nigeria, complement existing codes in the country. The Code which has the force of

⁴⁵ See section 30.4 of the Code.

⁴⁶ The consolidation exercise helped to reduce the total number of banks from 89 to 25 mega banks – through mergers and acquisitions and consolidations. This development posed serious challenges which the CBN has acknowledged in its Code of Corporate Governance, 2006.

⁴⁷ See s. 1.3 of the Code.

⁴⁸ sections 2.3, 2.4, 2.5, 2.10, 2.11 of the Code.

⁴⁹ Some have argued that the Code "may be unable to accomplish this if the underlying legal, institutional and regulatory frameworks for corporate governance in Nigeria are weak, inefficient and inadequate"- see Wilson, I. (2006) Regulatory and Institutional Challenges of Corporate Governance in Nigeria Post Banking Consolidation. Nigerian Economic Summit Group (NESG) Economic Indicators, April-June, 2006, 12 (2), page 4. <http://www.templars-law.com/upload/NESG%20Corp%20Gov%20Paper.pdf>.

law,⁵⁰ prescribes a minimum standard which individual banks must meet. All existing banks in Nigeria are required by the Code to adopt and enforce well articulated codes of ethics and conduct for directors, management and staff and to render periodic reports.⁵¹

The Code emphasizes the following, namely:

1. The institution of a committed and focused board of directors which will exercise its oversight functions with a high degree of independence from management and individual shareholders.
2. A unitary board but with more non-executive directors subject to a maximum of twenty directors.
3. A proactive and committed management team.
4. The need for adequate procedures to reasonably manage inevitable disagreements between the board, management and staff of a bank.
5. A well-defined and acceptable division of responsibilities among various cadres within the structure of the organization.
6. A balance of power and authority so that no individual or a coalition of individuals has unfettered powers of decision making.
7. Effective and efficient audit committee of the board.
8. External and internal auditors of high integrity, independence and competence.
9. Regular management reporting and monitoring system.
10. The need for directors to be knowledgeable in business and financial matters and also possess the requisite experience.

⁵⁰ Some have argued that the Code “may be unable to accomplish this if the underlying legal, institutional and regulatory frameworks for corporate governance in Nigeria are weak, inefficient and inadequate”- see Wilson, I. (2006) Regulatory and Institutional Challenges of Corporate Governance in Nigeria Post Banking Consolidation. Nigerian Economic Summit Group (NESG) Economic Indicators, April-June, 2006, 12 (2), page 4. <http://www.temlars-law.com/upload/NESG%20Corp%20Gov%20Paper.pdf>.

⁵¹ S.1.7. Code of Corporate Governance for Banks in Nigeria Post Consolidation (2006).

A definite management succession plan; Thus, the position of Chairman and Managing Director/Chief Executive Officer is separated and the two positions should not be held by same person. Similarly, the Code prohibits two members of the same extended family from occupying the position of chairman and that of the chief executive officer or executive director of a bank at the same time.⁵² At least, two non-executive board members should be independent directors⁵³ appointed by the bank on the merit. In order to ensure continuity and injection of fresh ideas, non-executive directors should not remain on the board of a bank continuously for more than three terms of four years each.

The Code provides that there should be, as a minimum, the following board committees – Risk Management Committee, Audit Committee and Credit Committee. It requires that there should be annual board and director’s review/appraisal covering all aspects of the board structure and composition, responsibilities, processes and relationships. The review should be carried out by an outside consultant and the review report presented at the annual general meeting and a copy sent to the Central Bank of Nigeria.

The Code also contains some disclosure requirement, risk management and provisions on the role of internal and external auditors. It requires that a committee of non-executive directors should determine the remuneration of executive directors, and that the non-executive directors’ remuneration should be limited to sitting allowances, directors’ fees, and reimbursable travel and hotel expenses.⁵⁴ More importantly, the Code requires banks to establish “whistle-blowing” procedure that encourages⁵⁵ all stakeholders to report any unethical activity or breach of the corporate governance code using, among others, a special email or hotline to both the bank and the Central Bank of Nigeria.⁵⁶

⁵² See Templars Barristers & Solicitors (2006) Corporate Governance – New Corporate Mantra? <http://www.templars.law.com>. Accessed 13 October, 2008.

⁵³ Sections 5.2.1, 5.2.3 of the Code of Corporate Governance For Bank in Nigeria, 2006.

⁵⁴ Who do not represent any particular shareholder interest and hold no special business interest with the bank Code of Corporate Governance for Banks in Nigeria Post Consolidation (2006), section 5.3.9.

⁵⁵ Including assurance of confidentiality.

⁵⁶ Section 6.1.12 of the Code.

4.4 IMPACT OF THE CODES ON CORPORATE MANAGEMENT

The two Codes have tremendous impact on the operations of corporate organisations in the country, and ensuring that discipline, transparency, accountability, probity, integrity and fairness are promoted as standards for creating value for shareholders, stakeholders and the general public.

For instance, the separation of the offices of the chief executive officer and that of chairman of the board of directors prevents over-concentration of powers in one individual and also ensures objective and effective discharge of the respective functions of the management.

Similarly, the SEC Code also recommends payment of remuneration, benefits and compensation to directors and top-level management of the company. While the executive directors are entitled to receive remuneration, the non-executive directors are entitled to be paid compensation and other benefits. This helps in aligning management interest with those of the shareholders', and will, to a large extent determine their performance. It is believed that, when tied to the company's stocks, directors' compensation or remuneration engenders in management and directors a sense of identification with, or creates a stake in, the company.

The Codes provide each of the stakeholders with the avenue or tools to checkmate all principal actors in the management of the company. In this way, it promotes fairness in managing the affairs of the company to all stakeholders. With the observance of the provisions of the Codes, internal rules and policies are adhered to by members of staff thereby ensuring good co-ordination of staff efforts, harmony in working relationship and general orderliness in the day to day running of the company.

The SEC Code recommends performance of duties of the board through committees. The audit committee is one such committee commonly established by public companies. That the shareholders have direct representation on audit committees suggests that directors do not dominate audit committees in Nigeria. This provision encourages greater accountability and more effective participation of shareholders in the affairs of the company.

It is further recommended that membership of the board should always comprised of persons with diversified knowledge, abilities and experience. This brings expertise and fresh ideas into the management of the company.

One significant provision in the Code of Corporate Governance by SEC is the proposal that every public company should have at least one independent director on its board. This is a sound rule aimed at ensuring good corporate governance as they would be a member on the board who has no principal business interest other than that of ensuring good management and development.

Finally, the Code of Corporate of Governance for Banks has the force of law and all existing banks in Nigeria are required by the Code to adopt and enforce it. This ensures that all due processes are followed in any given situation, and no room for excesses that could ruin the company.

CHAPTER FIVE

CONCLUSION

5.1 SUMMARY

In this research an attempt has been made to examine the separation of ownership and control of companies basically with the view to ensuring that there exist transparency and accountability on the part of corporate managers. In all, it is clear, as has been seen from the discussion so far, that the power of management is for the board of directors. These powers as vested in the board of directors can only be exercised in accordance with the provisions of the articles of association and the Act.¹

The development of a separate board of directors to manage the company has occurred incrementally and indefinitely over legal history. Until the end of the 19th century, it seems to have been generally assumed that the general meeting was the supreme organ of the company, and the board of directors was merely an agent of the company subject to the control of the shareholders in general meeting. However, by 1906, the English Court of Appeal had made it clear in the case of **Automatic Self-Cleansing Filter Syndicate Co v. Cunningham**² that the division of powers between the board and the shareholders in general meeting depended on the construction of the articles of association and that, where the powers of management were vested in the board, the general meeting could not interfere with their lawful exercise.

The amount of power exercised by the board varies with the type of company. While ownership in private companies is concentrated and the problem of ownership and control

¹ Section 63(2) CAMA.

² (1906) 2 Ch 34.

does not really arise,³ a typical public company, on the other hand, has a complex authority structure such that there is a wide gap between ownership and control. The ownership structure is oftentimes comprised of many individual and/or corporate shareholders with merely an ephemeral relationship with the corporation.⁴ As opposed to their role in private companies, shareholders in public corporations retain merely the rights to dividends, information, vote, appointment of directors and certain major corporate changes.

Accountability is secured by the imposition of mandatory legal duties upon directors and officers. Because directors manage and exercise control over the company, the law imposes strict duties on them in relation to the exercise of their powers.⁵ These include the duties to act honestly, to exercise care and diligence, not to make improper use of information acquired by virtue of being an officer of the company, and not to make improper use of position as an officer of the company. The duties imposed on directors are fiduciary in nature, similar to those that the law imposes on persons in similar positions of trust such as agents and trustees.⁶ The duties are exclusively owed to the company itself, and not to any other entity. In most cases, the law provides for a variety of remedies in the event of a breach by the directors of their duties.

In addition, corporate managers are subject to disclosure obligations. While the law does not forbid directors from dealing with their companies, it has some mandatory provisions to deal with directors' conflicts of interest, outlawing certain conduct or mandating disclosure, while leaving others for the shareholders to decide. The Act also deals with

³ There is usually a fusion of ownership and control and no real division of power. The people that constitute the general meeting are usually the same category of people that constitute the board and therefore have full control over the company's assets.

⁴ The shareholders are often far removed from operational details of management and therefore making them unable to police top management because they lack material information that is key to monitoring.

⁵ Directors are imposed with a duty to act at all times in what they believe to be in the best interest of the company as a whole, so as to preserve its assets, further its business, and promote the purpose for which it was formed in such a manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstance – section 279(3) CAMA.

⁶ Hence, directors are considered to be stewards of the corporations.

direct self-dealing by directors. These legal duties and obligations may be enforced by the company itself (where the duties are owed to the company rather than to individual shareholders), by shareholders, or by relevant regulatory bodies.

Although directors may be the ultimate managers of the company, shareholders also have a legitimate role in corporate governance. The Act in section 63(5) reserves certain rights and responsibilities exclusively for them in reviewing the performance of the board and taking actions if shareholders believe that performance is not up to expectations, this may include removal of directors.⁷ The defaulting powers of members give them some control over the company, but this largely depends on their ability to take active steps to review performance of management and hold them to account.

The separation of ownership and control creates the justification for defining an appropriate framework that will ensure transparency, accountability, probity, integrity and fairness in the management of the corporation. Both Codes of best practices in Nigeria, namely, the Code of Corporate Governance by Securities and Exchange Commission, 2011 and Code of Corporate Governance for Banks, 2006 have introduced new standards of accountability on boards of directors of companies and banks, respectively. These were specially formulated to complement the relevant provisions of the Act.

5.2 FINDINGS

The research has led to the following findings:

1. In order to avoid a conflict of interest, the Companies and Allied Matters Act in section 277 casts an obligation on a director who is in any way, either directly or indirectly, interested in a contract or proposed contract with the company to

⁷ See sections 262, 268(2) and 271 CAMA; see also *Longe v. First Bank of Nigeria Plc* (2006) 3NWLR (Pt. 967) 228.

declare the nature of his interests at a meeting of the directors where the contract is first discussed. The duty imposed on the directors to disclose their interests in contracts or proposed contracts with their company at meetings of directors of the companies is tantamount to making directors judges in their own cause. It is therefore a misconception to think, as the provision appears to do, that disclosure to one's cronies, rather than disclosure to those for whom one is a fiduciary, is an effective restraint on self-seeking director.

2. Section 287(1) of the Act generally forbids a director from making secret profits by accepting from any person a bribe, gift, or commission or a share in the profit made by that person from a transaction involving his or her company as a quid pro quo for facilitating the transaction between the company and the person. However, under section 287(3) of the same Act, the director is permitted to accept and keep the gift provided the gift is unsolicited or it is given as a sign of post-transaction gratitude, the fact of which must be reported to the board of directors and noted in their minutes book. The problem with this allowance is that the prevailing corruption culture in Nigeria may induce ex ante negotiations of rewards for facilitating a transaction. By permitting post-transaction rewards or gifts, parties may circumvent the law if the beneficiary of the transaction simply presents the reward afterwards in order to give it a cloak of legality.
3. Derivative action is one minority empowerment device under Nigerian law. It is an action intended to benefit the company as a whole by remedying a wrong committed against the company either by management or when management is reluctant to act on behalf of the company. However, it is unfortunate for the fact that if the plaintiff shareholder loses the case, then he will not only bear the costs of prosecuting the case but must also pay the costs of the company and of the

defendant directors. This is discouraging for not many shareholders will be daring enough to take such a risk.

4. Similarly, no derivative action can be brought unless the applicant can show to the satisfaction of the court that the wrongdoers are the directors who are in control and that the directors will not take necessary action. This is as provided in section 303(2)(a) of the Act. Limiting the wrongdoers to the directors who are in control of the company reduces the scope of the action. In most cases, even when directors are not the wrongdoers, they may collaborate with the wrongdoers and refuse to bring an action. Thus, derivative action under the Companies and Allied Matter Act may not cover cases of wrongs done to the company by persons other than the directors in control of the company.
5. Generally, the Codes of best practices have some commendable recommendations designed to ensure and enhance transparency, accountability, probity, integrity and fairness in the management of the company. While it is acknowledged that the institutions and the legal framework for effective corporate governance appear to be in existence in the country, the compliance and/or enforcement appear to be weak or non-existence. Although the Code of Corporate Governance for Banks, 2006 emphasizes that compliance with the provisions of the Code is mandatory for all banks in Nigeria, there is no any form of sanction for non-compliance. Therefore, a breach does not lead to legal consequences.

5.3 RECOMMENDATIONS

In view of the foregoing observations, the following recommendations are hereby proffered.

1. The law should be amended to make for absolute prohibition of any form of personal interest by directors in contracts with their companies. Any interested

- director who is involved in a contract with own company should be mandated to, first of all, resign his membership of the board as a condition for participation in the contract.
2. Subsection (3) of 287 of the Act which partially permits gifts or rewards as a sign of gratitude to directors for contracts with the company should be completely expunged. This is to avoid any possible manipulation or circumvention of the law by the board of directors. In addition, the liability of directors as provided in subsection (2) of the Act for any breach, shall be expanded to include criminal sanctions against erring directors.
 3. A shareholder or member of company who filed an action and has complied with the provisions of section 303(2) of the Act to the satisfaction of the court should be entitled to refund of all the money expended in the prosecution of every action for and behalf of the company, regardless of its outcome. Such money should stand as debt owed to the company and recoverable against the directors individually as deterrence.
 4. Similarly, the right of a member to bring derivative action should not be limited to actions against the directors alone as provided under section 303(2)(a) of the Act but also any other prospective wrongdoers for wider scope of the action.
 5. For Nigeria to reap the benefits of effective corporate governance there is need to strengthen the enforcement mechanism of the regulatory institutions. The roles of the Securities and Exchange Commission, Corporate Affairs Commission and courts are important in this regards. The knowledge by corporate managers that investigation may be conducted into how they have run the affairs and managed the business of the company may also constitute a check on their conduct.

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