LIABILITIES FOR CORPORATE MISGOVERNANCE UNDER NIGERIAN LAW

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Abstract

Corporate governance involves effectively running and administrating a company's business to achieve its objectives and policies while considering the interests of shareholders, stakeholders, and customers. It is a set of norms adopted as the standard practice for managing organizations, which aims to balance interests among everyone involved.

A healthy corporate organization thrives on the effective distribution of organizational powers, which encourages promoting and sustaining democratic values in the sharing of corporate power, representation, and participation.

However, in the Nigerian context, there have been cases of directorial abuse of power resulting in corporate misgovernance. This paper seeks to explore the legal implications of such actions and their direct or indirect impact on the well-being of the corporate organization in to ascertain the penalties for misgoverned. Acts that endanger the interests of the company, its investors, creditors, and customers are detrimental to the country's economy. Notably, legal instruments such as the Company and Allied Matters Acts (CAMA) 2010, Failed Banks (Recovery of Debts), Financial Malpractices in Banks Act 1994, and Investment and Securities Act (ISA) 2007 curb such actions. These legal instruments contain penal provisions for fraudulent acts or omissions by the controllers and agents of such entities.

The focus of this paper therefore is to review these penal provisions and the instances of their application to fraudulent company executives in the past. One of the key objectives is to evaluate the presence of liability provisions in legal instruments that hold companies and their officers accountable for non-compliance. Ultimately, the goal of the paper is to encourage and support the implementation of sound corporate governance and management practices in Nigeria.

KEYWORDS: *liabilities, corporate governance, penal provisions, organization, fraudulent acts.*

Introduction

Nigeria has been grappling with the challenge of corruption in its political system and practices. This issue has pervaded all sectors of the country, making concerted efforts to tackle this endemic problem imperative. The resultant effect of this decadence in the financial and corporate sector is the alarming rate of company failures and distress due to misgovernance and mismanagement and the apparent failure of inbuilt corporate governance and management devices to arrest the situation.

It was the need to checkmate such tendencies and stifle the likely repetition of the events of the 1990s and early 2000s, which led to the collapse of so many companies and banks that heralded the encoding and adoption of specific rules that will engender good corporate governance within corporate entities, and as well penalize certain acts of the agents and controllers of companies.

The focus here is on the Companies and Allied Matters Acts 2010 (CAMA 2010) to determine the extent to which it contends penal provisions against fraudulent company executives. The discourse on these instruments will be to search out whether they have liability provisions to penalize any company or officer of the company that fails to adhere to the provisions of these codes. Thus, we will be able to determine the enforceability of the provisions of these instruments.

LIABILITIES UNDER COMPANIES AND ALLIED MATTERS ACT, 2010 (CAMA)

The consequences of corporate misgovernance, as we have seen, can be quite debilitating, disastrous and monumental. It crumbles a company with its attendant consequences of loss of money, investments, life savings, and sources of livelihood, jobs and lives. These effects indirectly hurt the economy of any and many nations because of the increasing roles of corporate organizations in nation-building1; hence, the need to impose liability on erring company officers for fraudulent misconduct and abuses of corporate powers.

CAMA has made comprehensive provisions for the acts or omissions of company officers that are either fraudulent or illegal. This does not obviate the fact that a company correctly registered has its own personality2. Thus, certain acts of the officers of a company which are *ultravires3* the objects of the company can in certain circumstances bind the company such that the company would be liable provided the proper channels of decision making as prescribed in the companies memorandum4is complied with. This was aptly put by Lord Denning MR, when he said:-

> "A company may in many ways be likened to a human body. It has a brain and a 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 hands to do the work and cannot be said to represent the mind or will. Others are managers and directors 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 the company and is treated by the law as such"[5].

Hence, officers[6] who are the directing minds and will of the company, we have noted as the managers and directors of the company and, as such, are protected by a corporate veil [7] However, in its wisdom, the law has provided circumstances where this corporate veil can be lifted to see those behind the act, especially where something has been done wrong in a company[8]. The liabilities vary in consequence in many countries; those who bear such consequences are corporate entities or directors.[9]

These liability provisions of CAMA will be discussed under two sub-headings, to wit:

- Civil liabilities of officers of a company under CAMA 2010; and
- Criminal liabilities of officers of a company under CAMA 2010.

CIVIL LIABILITY UNDER CAMA 2010

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It had been stated earlier that a company duly incorporated has its distinct personality and is vested in law with powers to execute its functions and objects, and as such, can enter into contractual relationships with third parties just like an individual would. However, This does not clothe every act of the officers as that of the company to create liability for its relationship with third parties. The court held in the case of *Orji v Oyaso10* per Olagunji, JCA that it is a fatal omission when there is no evidence of the position held by an officer in a company that entitles him to execute a contract on behalf of the company, as it is not the act of every officer of a limited liability company that can bind the principal. Thus, if a director or officer of a company contracts with third parties in his name without disclosing that he was a mere agent for an existing principal, such an officer incurs and assumes liability for such a contract10.Accordingly, every company officer must act within the ambits of the company's objects and, most significantly, within the confines of his official or directorial powers to avoid incurring liability against a third party. These acts of misgovernance are further discussed below, and some of them can ground the lifting of the corporate veil.

When the Number of Members Drops

Section 93 of CAMA 2010 imposes liability on every director and officer of a company who was such a director or officer during the time the company carried on business for more than 6 months with less than two members*11*. The liability is jointly and severally with the company for the debts incurred during the period*12*. From the language of the section, it does not matter whether or not the directors or officers to be held liable were aware of the fall below the statutory minimum number of two members*13*. All that is required for an officer to be held liable for such debt is that he occupied that position during the period the number of members dropped below two and continued for a period of six months. The essence here is the prohibition of the tendency of one man to run a public limited liability company as a one-man affair, which jeopardizes the interest of investors and customers alike. It also reduces the tendency of connivance between the one remaining shareholder and the directors

to swindle customers' money or other unwholesome activities because there is every tendency for such a lone shareholder to be on the executive or managerial board.

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When the Number of Directors Drops

Section 246 of CAMA states that a duly registered company should have at least two directors if, at any given time, the number of directors falls below the statutory number of two. The company shall cease to conduct business after one month if the number of directors falls below two unless the company appoints new directors. It further prescribes liability for any director or member who carries on business with such knowledge for a period of today for the debts incurred by the company for that period. It, therefore, follows that where the company/director cannot make appointments within the period stipulated under the Act, it will be advisable for them to halt their business or risk bearing the brunt of the liabilities that will be incurred. This provision accords with the spirit of democracy and good governance, as allowing one man to control the resources of shareholders and the company has every tendency to abuse and arrogate many powers to oneself such that investors' financial security is not guaranteed.

In consequence, internal and external investments are threatened. It is statutory that a company should hold certain meetings[14] of the board of directors, which can only be valid if such quorum continues from the beginning to the end of the meeting. Accordingly, the possibility of fraud and collusion between the one director and any member or shareholder is checkmated.

In its wisdom, the law attaches liability to anyone who holds himself out as a director within the context of a director properly so-called [15] of a company without being duly appointed to act in such capacity. Such a 'director' will bear personal liability for his action and any contract he purportedly enters into on behalf of the company[16].

Secret Profits

Furthermore, directors of a company, being agents and trustees[17] of the properties of the company, are expected by law to put the interest of the company that they represent first and foremost. This places on them the

burden of disclosing personal interest in a transaction where the director's personal interest tends to clash with that of the company. Consequently, if he makes a secret profit from the transaction, section 280 pronounces him liable to render accounts of such secret profits unallowed to the company. This principle, which now exists in our law, originated in English common law wherein a director or officer of a company lacks the ability to enter

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into a contract with the company of which he is a director. This is so even though the terms of such a contract are perfectly fair to the company and the best the company may get anywhere else in the market[18]. This is because the company will be running the risk of the director abusing his office[19]. This principle was also meant to forestall the possibility of a director using the information he gained from the company by virtue of the position he occupied in the company. It does not suffice to say that the company could not have made a profit after all to exculpate the defaulting director from liability. This was the decision of the court in *Regal (Hastings) Ltd. v Gulliver*[20]. Thus, liability to account to the company lies on any director or officer of the company who makes secret profit without full disclosure as and when due, making it impossible for profiteering against the company by its privileged officers.

Diversion or Misapplication of Company Funds, Loans and Properties

CAMA also provides for the personal liability of directors and officers of the company who divert the company funds or loans meant for specific contracts or projects for other purpose or their own clandestine agenda[21].

It can be deduced from the provisions of Section 290 that a director or officer will be personally liable not just for embezzlement, fraud, and misuse but also for misapplication of such funds, loans and property. The phrase 'with intent to defraud' used in the above section seems slippery[22]. The uncertainty in the above section is worsened by the combined reading of section 279(3) and (5). The latter seemed like a fetter against the unguarded exercise of the directors' powers concerning funds, loans and properties by stating that 'a director shall exercise his powers for the purpose for which he is specified'. This certainly would guide against the un-wanton application of the resources of a company.

Surprisingly, subsection (3) dragged it all in the mud when it provided that:

> “A director shall act at all times in what he believes to be 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, and in such manner as faithful,

> diligent, careful and ordinarily skillful director would act in the circumstance".

Consequently, it appears that whatever a director 'believes to be in the best interest of the company' at all times will suffice, provided it can be shown to have been a diligent and careful decision that a faithful and skilful director in his position would make. Interestingly, section 283(1) provides that directors '…shall exercise their powers honestly in the interest of the company and all the shareholders,' and even that of employees. If they fail to maintain a balance between these interests, they will be held liable for any financial consequence thereto[23]. The point being made here is that the existence of many interests can authenticate the diversion of company funds, loans or property for the execution of a project different from the one proposed. On the face of it, this may seem innocuous and diligent but ideally scheming in nature.

Prohibition of Loans to Directors

Section 270 CAMA prohibits a company from giving a loan to its director or guaranteeing any security in connection with a loan to any director except:

(a) It is meant to pay for debts incurred for the benefit of the company; or

(b) Where the business of the company is the giving of loans or guaranteeing loans made by other persons. Any director who authorized the granting of such loans or guarantees is jointly and severally liable to the company for any loss incurred*24*. This provision adequately checkmates the tendencies of the company director colluding to defraud the company by approving loans for themselves or the friends and families unguardedly.

Acts of a Co-director

As has been stated, every director owes it a duty to the company to exercise and discharge his responsibilities in the best interest of the company with the utmost diligence, care and skill. The same standard of care is expected of all directors acting as a board*25*. Thus, where a board of directors commits a breach of trust, every director who was aware of such and did nothing is jointly and severally liable to the board members involved. In order to forestall a situation where a director wants to plead *alibi* at the time the board erred, section 287(3) makes each director personally liable for the actions and inactions of the board to which he belongs. It went further to state that the absence of the director at the time of the deliberations would only exculpate him if such action were justified. The term 'justified' is not qualified anywhere in the Act and, in my opinion, is a loophole since it can be adapted to any properly painted circumstance.

Liability for Delegated Duty

A director is responsible at all times for the proper and honest discharge of the responsibility of his office, even when he delegates his function to another person. He must observe and supervise such person as any default by the delegate/agent will render the director liable for breach of duty. Albeit a director is not precluded from delegating his responsibility to other company officers or staff of the company*26*, he is only permitted to delegate within the law, and the company's articles provided he supervises it diligently. Accordingly, a director, by section 279(7) of CAMA, is to refrain from delegating the duties of his office in a manner that portrays abdication of duty. In *Clinique Ste Elisabeth Case27 court, he held that company directors may be held liable despite delegation of authority.*

Prohibition of Secret Benefits

Generally, a director or other officers of a company owe fiduciary responsibilities to his company, which involves not doing anything to harm the interest of those he protects. Hence, a director under section 287 of CAMA is not allowed to accept any gratification from any person in

any transaction involving his company. A director who runs foul of this provision would have breached his fiduciary duty to the company, so he will be liable to return all such gifts to the company. The company may also use such a director jointly and severally with such other persons for the damages suffered by the company. The fact that the company benefited from such a transaction will not suffice as a defence to exculpate the director from liability*28*. These notwithstanding, in certain cases where it seems the director's conduct is *ultra vires* the company, provided he acted honestly and reasonably. He believed that what he did was, in

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cases *intravires* the company, he might be relieved from being liable[29]. This may not avail him if the conduct concerns legal matters, whether or not he did what he thought was ideal; he is advised to seek legal services on such occasions to avoid incurring liability[30]. However, section 67(1) of CAMA provides against such exemption from proceedings concerning fraud, breach of duty, and breach of trust unless such exemption was operated before the coming into effect of the Act [31]. In some reserved situations, the liability of officers of a limited liability company may become unlimited if the memorandum so provides [32]. Where the memorandum so provides any company director, manager or any member who proposed the appointment of another person as a director is expected to attach to the proposal a statement to the effect that the liability of such person who is willing to accept that office is unlimited.

Criminal Liability Under Cama 2010

The nature of corporate activities is such that before now, it was doubtful whether corporate misgovernance or directorial impropriety, no matter how heinous, will result in criminal offence[33]. However, section 2 of our Criminal Code[34] had settled the controversy in the Nigerian context when it defined a criminal offence as "an act or omission which renders the person doing the act or making the omission liable under this Code or under any Act, or Law…" This, therefore, makes it a criminal offence for any director or officer who breaches any provision of CAMA to bear penal consequences. This position had been re-echoed by the learned jurist, Lord Atkin when he said that the criminality of an act or omission can only be indeed determined by the penal consequences; if such a vital

ingredient is found missing, then it is not a crime[35]. These can be in the form of imprisonment, imposition of fines, or loss or restrictions of rights and privileges.

> Corporate crime has therefore been defined as; "illegal acts, omissions or commissions by corporate organizations themselves, or as social legal entities or by officials or employees of the corporations."[36]

This definition captures the circumstance where the officers and directors ~~are jointly and severally liable with their company for a delinquent act. It~~

has also been defined as a delinquency by a person occupying a high social status in his place of employment[37].The most expansive and veritable definition that captures the essence of this work is that proffered by Dominic Asada when he defined such crimes as:

> "improprieties in public corporations is expressed most frequently in terms of misrepresentations in financial statements of such corporations, manipulation in the stock exchange, commercial bribery, bribery of public officials directly or indirectly, in order to secure favourable contracts, embezzlement and misapplication of funds etc".

The fact that an act or omission of the corporate organs has been penalized does not preclude any third-party victim from bringing a civil action for compensation for his loss, despite the rule in the much-flaunted case of *Smith v. Selwyn*[38]. The complexities of the modern-day economy are so intertwined with the social milieu that the fragility and collapse of corporate entities result in heavy financial losses, which are nonetheless not commensurate with the damage to social relations and concomitant breach of trust and distrust. These reasons are believed to have given a fillip to the penal provisions in legal documents for corporate entities. The CAMA contains many of these provisions, which shall be reviewed herein.

Political Donations and Gifts

Section 38(2) of CAMA prohibits a company from making a donation or gift of its property or funds to a political party or a political association for any political purpose, and any person involved is liable to refund such amount to the company. Such a member or person is guilty of an offence and liable to a fine equal to the amount or value of the donation. From the language of this section, it follows that a director's liability attaches to where he was in the meeting where the donation was deliberated and put to vote, and he voted. However, he would not be liable to the other directors if he did not vote in favour of the political donation or gift.

It is shocking for the Act to say that the company will also be liable alongside the defaulting directors; if that is the case, who has the locus to challenge such a donation? The Act is silent on this.

However, this provision was meant to checkmate the decadent practice, which started in the 1970s when corporate organizations donated to political parties, political office holders or politicians hoping for future favours. Although some authors have argued that where the consent of shareholders is obtained, such a donation should not be outlawed, I humbly disagree with this opinion as the shareholders who are also interested in returns on their investment will not mind indulging in the Act provided the company gets to win contracts from government in future.

Default in Maintaining the Register of Shares and Debentures of Directors

It is expected of every company under section 275(1-3) of CAMA to keep and maintain a register containing particulars of shares and debentures held by each director of the company. In order to ensure compliance, section 276 makes it compulsory for every director to give notice of such matters to the company in writing, as mentioned above. Any director who is in breach of the provisions of section 276 is guilty of an offence and, upon conviction, liable to a fine of ₦50[39]The financial consequence for the breach of the above section is relatively

infinitesimal. However, the penal consequences of a conviction are unarguably a great deterrent.

Default in Disclosure of Interests in Contract by Directors

Every company director owes a fiduciary duty to the company, which imposes a duty on the directors to put the company's interest first at all times. Thus, when a company is about to enter into a contract, and any of its directors have any interest directly or indirectly, whatsoever in such contract or is a member or director in such company/firm with whom the contract will be entered into, the director is mandated by section 277 of CAMA to disclose such interest on the day the issue of the contract is raised. Failure to disclose such interest makes such a director guilty of an offence and, upon conviction, liable to a fine of ₦100[40].It can be gathered

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from the above that a director is not restricted to holding such office in one company alone[41]. He can hold a directorship position in more than one company[42] but owes a fiduciary duty to make sufficient disclosure of interest wherever there is a conflict of such interest.

Default in Disclosing Directors in Trade Catalogue

It is mandatory for every company incorporated in Nigeria under section 278 of CAMA to display on the trade catalogues, trade circulars and business letters where the company's name appears in legible characters, the present forename or initial, surname and nationality (for non-Nigerians) of all its directors. Failure to so display makes every such officer in breach guilty of an offence and, on conviction, liable to pay a fine of ₦50[43]. It can be garnered from the provision that the non-provision of each information constitutes a separate offence and that only officers who default in providing any such information will be guilty of such an offence.

Unlimited Liability of Directors

In certain specific circumstances, the liability of a company director is unlimited by its memorandum[44.] At another instance, the company's articles may make provision for the alteration by special resolution of its memorandum to make the liability of directors or officers of the company

unlimited[45]. It becomes as valid as initially provided in Memorandum [46] when such is passed.

However, in all instances in a limited liability company, it is mandatory that any person who proposed the appointment of another person as a director is expected to attach to the proposal a statement to the effect that the liability of such proposed person is unlimited and notice thereof given to such a person before he accepts the office. Any director or officer who is in breach of the above provisions shall, on conviction, be liable to pay a penalty of ₦100[47].

Liabilities of Directors about Offences Antecedents to or in the Course of Winding Up

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Under section 502 of CAMA provides punishment for offences committed not just by the present officers of a company undergoing Winding Up (voluntarily or by order of the court) but also committed by erstwhile officers of the company who were functioning in such official capacity when the alleged offences were committed. This section applies mainly to past or present company officers who were members when the alleged offence was committed or when the court ordered the winding up of the company[49].

The above-stated section outlaws certain conduct of officers in a company that is capable of being punished. Such directors may be present or past officers when a company is wound up. The said section obligates an officer of a company that upon demand by the liquidators of all the property, landed and personal, wherever located, he should, to the best of his ability and knowledge, discover and hand over such to the liquidator. The director is mandated to give complete information with respect to the particulars of the property, which includes disclosing how and from whom it was acquired and the price paid for it[50].

Paragraphs (b) and (e) of section 502 require every company officer to deliver such property to the liquidator as a trustee of the company's properties in his possession. These paragraphs apply to both the present and past officers alike, as the latter is a constructive trustee for the properties of the company in his possession.

The said subsection further makes it an offence for any director to hide or remove any part of the company's property to the value of ₦100 and above before the beginning of winding up. It is also an offence under the said section for an officer of the company to be aware that a debt to or from the company has been falsely proved and he fails to notify -The Liquidator within a month. Hence, even if such a director did not personally partake in any of those conducts, his knowledge and likely collusion with those who did will still render him liable as if he was actively part of it.

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It further criminalizes any act that affects the company's records before winding up. They include concealing, destroying, mutilating, and falsifying the books or paper connected to the company's property.

Furthermore, a director who tried to present, take an unauthentic account of losses and expenses of the property of a company in a creditors meeting or any false representation thereof or obtains credit from another under the guise that the company is still solvent and which the company did not pay for subsequently, he shall be liable for an offence. Also guilty of an offence if he pawns, pledges or disposes of any property the company obtained on credit which at the said time the company had not paid.

Any director found guilty of any of the above misconducts will, upon conviction, be liable to imprisonment ranging from 12 months for offences with light consequences to the company and two years or more for severe directorial misconduct under section [51]. It is noted here, and rightly too, that the mental element may inadvertently become a clog in the wheel of efficient prosecution of self-serving past or present directors who have enriched themselves inordinately at the expense of their distressed companies.

Liability of Directors in Relation to Falsification of Books

Section 503 of CAMA makes it a criminal offence where a company is being wound up to destroy, mutilate, alter, falsify any books of account, be privy or make any fraudulent entry in any register with intent to deceive any person and, upon conviction, such an officer is liable to two years imprisonment or a fine of ₦2,500.

Fraud by Officers of Company in Liquidation

This section applies to every officer of any company being wound up or which company is voluntarily winding up who occupied such office at the time the alleged offence was committed. Section 504 of CAMA makes it an offence for any officer when winding up to give credit to anyone or confined with anyone "at the time of levying execution on the property of the company with intent to defraud the creditors". Any officer involved in any of the acts mentioned above "shall be guilty of an offence and on conviction be liable to imprisonment for two years" [52]. On the other hand, Section 504 provides for three kinds of offences. At the same time, section 505 also criminates the conduct of a director who fails or neglects to keep proper books of account[53]for two years before the beginning of winding up or for the period between the incorporation[54]of the company and the beginning of the winding up depending on which period is shorter. A director or any officer in breach of this provision is guilty of an offence and, on conviction, liable to a ₦250.25k fine.

Fraudulent trading is another provision that attracts penal sanctions for directorial misconduct. Section 506(1), therefore, prescribes criminal sanctions on the officers of a company, which herein also includes directors, managers and secretaries who knowingly partook in such a transaction involving the company. This section imposes a fine of ₦2,500 or two years imprisonment upon conviction for any officer in breach of its provisions as well as contributing to the assets of the company during winding up. Thus, the punishment for fraudulent trading is not narrowed down to incidences of fraud discovered during the winding up of the company. It could have occurred any time before the winding up[55]. The above section made provision for three kinds of

offences that can be committed by a director while discharging his duties as a director of the company, namely:

a) Intention to defraud the creditors of;
a. The company;
b) Any company, and
c) For any fraudulent purposes.[56]

The term ‘intent to defraud’ has been alluded to dishonesty[57]. The court can determine the intention to defraud by considering whether a person of the director’s standing, intelligence and experience would not have known that what he was doing was improper in the particular circumstances, just as a reasonable man in the society would comprehend. Thus, it objectively tests what an ordinary, reasonable and honest man would do in similar circumstances. However, the prosecution will have to prove beyond reasonable doubt that such intent was fraudulent[58]

As previously observed, establishing intent to defraud may be challenging for the prosecution. Apart from the required standard of proof, which is beyond reasonable doubt, fraud generally is a challenging concept that is not easily proven. The requirement of fraud may open considerable opportunities for delinquent directors to escape prosecution. In light of this, a much more amenable and less problematic phrase should be adopted. Something like “with intent to misapply the funds” of the company is preferable. Such a phrase would ensure that delinquent or self-dealing 59 directors are not given unbridled liberty to defraud the company.

From the Provisions of Section 508, it is evident that the prosecution of erring officers of a company is within the exclusive preserve of the Attorney General. This he can exercise personally or delegated to his

subordinates in office as provided in the 1999 Constitution of Nigeria*60*which also makes it evident that section 508(5) and (6) of the CAMA solicits the assistance of the liquidator, officers and agents of the company for the Attorney-General and prescribes necessary penalty for non-assistance where the court may direct that the liquidator bear the cost of bringing the application personally.

CONCLUSION

We have succeeded in evaluating the provisions of CAMA and its civil and penal provisions against the conducts of officers of a company which amount to corporate misgovernance. These provisions are meant to not only to recover and punish the erring officer but also to deter the members of the society from toeing that path. This has been captured in the words of Okonkwo[61]when he said:-

> “The principle of deterrence which at present is probably the most potent of punishment, takes two forms. Punishment be imposed to deter the particular accused from offending again; or it

> may be imposed with the more general view of deterring the public from doing what the accused did … Despite much disapproval, this general theory of deterrence, which subordinates the individual to the supposed greater good of the community and which runs counter to the notion of fair deserts for the individual, is a much favoured judicial attitude".

Bibliography

1 It is observed that 'the governance of corporations is now as important to the world economy as the government of countries. Corporations create jobs, generate tax income, produce a wide array of goods and services … and increasingly manage our savings and secure our retirement income'. See Bunmi Oni, "Corporate Governance: A Leadership Challenge in Nigeria", (paper presented at the 5th Adetunji Ogunkanmi Lecture, November 24, 2005), p.2.

2 Section 37 of CAMA 2010 provides that once a company is duly registered and incorporated it becomes a corporate entity having perpetual succession and a common seal, which means that it can sue and be sued in its own name; it can also acquire and hold property. 'It has the powers to the things normal humans can do.' See also section 71 of CAMA.

3 Section 39(1) of CAMA 2010 provides that 'a company shall not carry on any business not authorized by its memorandum and shall not exceed the powers conferred upon it by its memorandum or this Act'. Thus, thus a company should keep within these powers or risk liability for exceeding

them; not minding the fact that the act was executed by officers of the company. See the case of *Ashbury Carriage Co. v Riche* (1875) L.R. 7 H.L. p. 653; this does not however affect a contract of conveyance to and from the company. See Section 39(3) of CAMA.

4 Because it's a general rule that where any act of the company does not pass through the General Meeting, the Board of Directors or a Managing Director but through a single director or some officer or agent, the company is not liable for such acts. See Dr. Olugbenga Shoyele and Dr. Patrick Oche, 'Civil and Criminal Liabilities of the Board and Management of Public Companies, *Journal of Public and Private Law, University of Jos (online), p. 139*

5 *H.L. Boston (Engineering) Co. Ltd. v T.J. Graham & Sons Ltd*. [1957] 1 Q.B. 159 at 172; [1956] 3 All E.R. 624 at 630; that is why it is provided in section 65(b) of CAMA that where an act done is not in furtherance of the authorized business of the company it will render the company liable to third parties provided it emanated from the embers of the company in general meeting, the board of directors or of a managing director (…). That is why in most instances of liability under CAMA the defaulting officers are held jointly liable with the company.

6 It should be noted that officers had been defined in section 567 of CAMA 2004 in relation to a body corporate to include directors, managers or secretary.

7 This is a principle of law that protects the employees of a company because the company its enjoys a separate and a distinct personality from its shareholders, owners and directors. See *Lee v. Lee Air Farming Ltd.*(1961) A.C. p 12 where the court held that the deceased family was entitled to compensation from the Lee Air Farming Ltd although the deceased was the owner of the company, as well was in active employment of the company as a director and also an employee because the company upon its incorporation acquired a separate personality from the deceased owner and employee.

8 It was based on this principle that Economic and Financial Crimes Commission (EFCC) was able to prosecute the former CEO's and key officers in Oceanic International Bank, Fin Bank, Intercontinental

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Bank Plc; and the ongoing prosecution of the CEO of Bi-Courtney company.

9 Section 71 of CAMA provides that a duly incorporate company can enter into a contractual agreement which if entered into by an individual would be valid and legally binding. It can as a matter of principle enter into these contracts through the agency of its officers. That was why in the case of *WAA Nig. Ltd. v WAP Ltd.* (1968) 1 ALR Commercial 65, the court did not find it difficult in finding the defendant company liable for the credit facilities given to the defendant by the plaintiff. Here the defendant company contention that its general manager lacks the power to enter into such contract was swiftly dismissed by the court as the general manager is part of the controlling minds of the company and which was not position was not wrongly exercised in this circumstance and as such the contract and its attendant liability was held to bind the defendant company.

See also Lord Denning's statement in H.L. Boston (Engineering) Co. Ltd. *v* T.J. Graham & Sons Ltd. *Op. cit.*

10 2002 NWLR (PT 643) 1 CA. In this case, the respondent ordered for certain equipments assuming he was doing was doing so on the authority of the company; which position was not effectively proved during the proceedings. The court dismissed his contention.

10 See the case of *ELkington & Co v Hunter* (1892) 2 ch. 452.

11 Section 18 of CAMA states that 'any two or more persons having the requisite legal capacity can float a company thereby making the minimum number to be 2 members'.

12 It should be noted that the section did not specify whether the debt meant here includes both reasonable and reckless debts. I should think that the likely interpretation should be an unreasonable debt as the company itself is jointly and severally liable such other officers as there is at the time of default.

13 Membership of a company is as defined by section 79 of CAMA which provides that a member of a company is one who is a subscriber to the memorandum of the company, or one who agrees in writing to become a member of the company and whose name is entered in the register of

members. The section concluded by stating that every shareholder in a company holding at least one share in case of a company having share capital is a member of such company. See *Berliet v Francis* (1987) 2 NWLR pt. 56 at 67 where the court held that there are two ways of becoming a shareholder/member of a company in Nigeria. Firstly, one must show a contract of agreement and secondly, establish that one's name is in the register of members.

14 See Section 211 and 215 of CAMA.

15 Defined in section 567 of CAMA as 'includes any person occupying the position of a director by whatever name called; and includes any person in accordance with whose directions or instructions the directors of a company are accustomed to act.

16 This provided for in section 250 of CAMA. It contains a proviso that when such a person is held by the company its representative in any such capacity, the company will bear the liability.

17 Section 283 of CAMA specifically provides that 'directors are trustees of the company's money's, properties and powers and as such must account for all the moneys over which they exercise control and shall refund moneys improperly paid away, and shall exercise their powers honestly in the interest of the company and all its shareholders, and not in their own or sectional interest.'

18 See *Aberdeen Railway Co. v Blaike Bros* (1854) 1 Macq.(H.L.) 461; where the a company made a contract for the supply of goods from another firm, later to discover that its chairman is a partner in that other firm. The company refused to accept the goods and the matter went to court. The court held

19 The former CEO of Oceanic Bank Plc, Mrs Cecilia Ibru was discovered to have used the proxy companies (*e.g.* Cloudy Heights, Enifor, Prisky Gold, Bliss Bloss, Velvox and Circular Global) to acquire over 275 million shares in First Bank Nigeria Plc for N275,795,139; over 64 million shares in Union Bank of Nigeria valued at N64, 218,000; 93 million shares in the United Bank for Africa for N93,750,000; and shares in Oceanic Bank for N1,076,220,421. Other acquisitions included: 13 million shares in Oando for N13, 200,000; 388 million

units of shares in other companies; and 600 million shares in BGL Plc. Prisky Gold, another company with which she had links, was used to purchase the following shares: 48.8 million in Access Bank Plc; 8,140,500 in Dangote Flour; 12,480,000 in Dangote Sugar Refinery; 12,500,000 in Fidelity Bank; 27,434,791 in First Bank; 25,316,400 in Japaul Oil; 10, 280,000 in Zenith Bank; and 200,000,000 in Transcorp Plc. Africa Lloyd, another company traced to her, purchased 431,201,702 million shares in Oceanic International Bank Plc. See generally, *The Sun Newspaper*, 9 October 2010.

20 (1942) 1 All E.R. 378; (1967) 2 A.C. 134; here the company wanted to purchase a property (a firm) but owing to its financial state was not able to. One of its directors alongside others put some money together and bought the property and sold its shares more than they bought making quite a profit. The company brought an action for the profit made by that director. The court held that the directors were accountable to the company for their profits since they had obtained it from an opportunity that came to them as directors; and that it was immaterial that the company had lost nothing since it had been unable to make the investment itself.

21 See Section 29

22 See Dominic Asada 'Civil Liabilities of Company Directors for Corporate Mis-governance in Nigeria', available online at www.researchgate.net/publication. We humbly disagree with the learned writer, the said section used the phrases 'with intent to defraud' and 'any officer…in default' which are suggestive that it is not a strict liability but a subjective one. Hence, we are of the view that for a suit to succeed against a director on this section, the plaintiff will first of all have to lead evidence to establish that there was 'intent to defraud'.

23 *Park v. Daily News Ltd*. (1962) Ch. D 927; Where a director in a bid to prioritize these interests decided to sell the company and distribute the proceeds to the employees for their up keep while the shareholders got nothing. The court held that the arrangement was unfair and void, thus the director was liable for the proceeds he shared.

24 Section 270(3) of CAMA 2010

25 'Liabilities of Company Directors' *Paul Usoro & Co. Journal (online)* April, 2008

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

27 March 24, 2010, 151/10 X, (although it refers to criminal responsibility) – the provision discussed therein is similar to the one under CAMA. See webinformation at www.internationallawoffice.com/information/ copyright.aspx, accessed on 08/08/2010

28 Section 287(4)

29 See *Re Claride's Patient Asphalt Co* (1921) Ch. 543; and section 641 of CAMA

30 See *Re Dupmatic Ltd*. (1969) 2 Ch. 305.

31 This is with respect to auditors appointed by the company as a director.

32 Section 288(1) of CAMA.

33 There had been raging controversy over the issue of white-collar crime constitute in itself crime properly so called. See American Sociological Review X (April 1945) 132-139.

34 Nigerian Criminal Code, Cap C38, Laws of the Federation 2004; and S. 3(1) of the Panel Code respectively.

35 See Lord Atkins dictum in *Proprietary Articles Trade Association v. Attorney General for Canada* (1931) AC 310 at p. 324.

36 C. Reasons, 'Crime Against the Environment: Some Theoretical and Practical Concerns', *Crim. L.Q.*Vol. 34 Nov. 1 (1991): in David Folorunsho Tom, 'Corporate Crimes and Liability under Nigerian Laws'.

37 See E.A. Sutherland, *White Collar crime*, (New York, Dryden Press, 1949) p. 8.

38 (1914) 3 K.B. 98. This rule is based on the common law principle of public policy which demands public rights to be redeemed before individual rights are redeemed.

39 Section 276(3)

40 Section 277(4)

41 Section 281 of CAMA; see also *Thomas Marshal (Exporters) Ltd. v. Guinle* (1978)

42 This does not apply with respect to banks.

43 Section 278(3).

44 Section 288(1) of CAMA.

45 Section 289(1).

46 Section 289(1).

47 Section 288(2) of CAMA.

48 Officer here in relation to body corporate involves directors, managers and secretary.

49 Dominic Asada, *Op. cit.*note 40.

50 Section 502(1) (a).

51 For every other offence under the section, note that if a director can prove that he had not intent to defraud the company with respect to paragraphs (a), (b), (c), (d), (f), (v), and (vi); and paragraphs (h), (i) and (j) if he can show that he had no intent to conceal the state of affairs of the company or defeat the law

52 This section of the Law corresponds with S. 307, 1968 Companies Act. See also S. 418 of the Criminal Code Act.

53 Proper books of accounts are books exhibiting and explaining financial transactions and positions of the trade or business of the company, showing cash received and paid, statements of the annual stock takings etc.

54 See sections 35, 36 and 37 of CAMA on the incorporation status.

55 See section 644 CAMA, see also S. 506(2) which says a company need not be in liquidation before prosecution can commence.

56 However, a fourth requirement has been added (though not envisaged under section 506 CAMA) in the case of *R v. Kempt* (1988) 2 WLR 975.The court held that an offence is deemed to have been committed if business is carried on with the intention to defraud the company's custom

57 *Scoth* (1975) AC 838.

58 Section 506(3)

59 This phrase first gained recognition in *Tito v. Inaddel* (No.2) (1977) ch. 106, where Megaru, V.C. first made use of it.

60 Section 174 of the 1999 Constitution of Federal Republic of Nigeria As Amended. See *DPP v. Akozor* (1962) 1 All NLR 235. See also *Tukur v. Gov. of Gongola State* (1988) 1 NWLR (Pt. 68) 37 *Ibrahim v. The State* (1986) 1 NWLR (Pt. 18) 650

61 See generally, Okwonkwo & Naish, *Criminal Law in Nigeria* (Ibadan: Spectrum Books, 1992) at p.281 37. See also U.K. Law Commission Working Paper No. 44 (172) p. 34 and 38.