

Directors Private Liability Under Nigerian Law and Remedies

Corporations & Directors

Incidents of corporate failures have continued to increase in spite of public and private initiatives to reduce them. These initiatives are important because where a corporation fails, it affects not only the shareholders and employees of that corporation but also the clients of the corporation. An example is a pension fund company in the United Kingdom , which is presently under threat of insolvency.

Legislations' have always been available to arrest some of these human problems. Unfortunately, the Directors and Shareholders of most companies, especially the private ones, where inappropriate behaviour, which leads to corporate failure, occurs, are reluctant to seek to enforce their legal rights and investments, against erring Directors.

This Newsletter is a minor contribution to sharing some enlightening literature on the Law regulating Directors, their duties and penalties for breaching those duties.

Directors & Their Duties?

Section 244 of the Companies & Allied Matters Act, 1990 ('CAMA') provides that the Directors of a company are appointed by the company to direct and manage the business of the company. All underlinings in this paper are made by the Author unless stated otherwise.

Fiduciary Duty

Section 279 of CAMA provides that 'a Director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its benefit'.

Section 279 (3) of CAMA provides 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 purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful Director will act in the circumstances?.

Thus it was held in the case of *OKEOWO v. MIGLIORE* [1979] NSCC 210 @ 263 that the Directors' fiduciary duty is not for any individual Director's advantage but for the advantage of the company. Also see the Supreme Court decision in *ASTRA INDUSTRIES v. NBCI* [1998] 3 SC 98 @ 119 where it was held that *“In the case in hand, the Directors of the Defendant Bank therefore alert to their responsibilities, could not have exercised their discretion in favour of the Plaintiff, the proper effect of which would be to further dilute the Defendant's security when the Plaintiff was already in breach of its previous undertaking?”*

Section 279 (9) of CAMA makes any duty imposed on a Director under Section 279 enforceable against the Director by the company and not its shareholders. This provision follows the rule in *FOSS v. HARBOTTLE* [1843] 2. Hare. 461, which states that the proper Plaintiff in an action in respect of a wrong allegedly done to a company is the company itself, and not its shareholders. The exceptions to this rule are stated later on in this Newsletter.

Secret Profits By Directors

Section 280 (1) of CAMA provides that the personal interest of a Director shall not conflict with his duties as a Director in a company. Section 280 (2) goes on to provide that *“A Director shall not:*

- In the course of management of affairs of the company; or
- In the utilisation of the company's property make any secret profit or achieve other unnecessary benefits ?.

Section 280 (3) of CAMA goes on to state that where any secret profit is made or unnecessary benefit is derived, the Director shall be accountable to the company and liable for the secret profits. The exception is if he disclosed his interest to the company before entering into such a *“secret?”* transaction.

A Director is also restrained by Law from misusing his company's confidential information upon his ceasing to be a Director of the company. See Section 280 (5) of CAMA. Where a breach occurs, the company has the right to obtain a restraining injunction, against the Director, so that the information is not misused by virtue of the Director's previous position. This rule was followed to the letter in the matter of *NASR v. BEIRUT-RIYAD NIGERIA* [1968] 5 NSCC 218 where it was held that a Director must not negotiate a contract with his employer company as would put him in a position to profit at the expense of the company. Should he do so, the

company can maintain an action for damages and or restitution.

Duty of Care & Skill

It is a known principle that persons who stand in a fiduciary relationship to another must exercise a duty of care when managing that relationship. Section 282 (1) of CAMA therefore provides that "Every Director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interest of the company, and shall exercise that degree of care, diligence and skill which a reasonably prudent Director would exercise in comparable circumstances".

Section 282 (2) goes further to provide that a "failure to take reasonable care in accordance with the provisions of Section 282 of this Act shall be ground for an action for negligence and breach of duty".

Subsection 3 of the above Section makes each and every Director of a Board, individually and collectively liable for actions of the Board save where the Director can for example justify his absence at a Board meeting at which the alleged decision was reached.

Trusteeship

The Blacks Law Dictionary defines a Trustee as "One who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary".

Section 283 of CAMA also makes the Directors of a company, whether a private company or a public company, Trustees of the company. Subsection 1 of Section 283 says "Directors are Trustees of the company's moneys and their powers and as such must account for all moneys over which they exercise control and must refund any moneys improperly paid away, and they must also exercise their powers honestly in the interest of the company and all the shareholders and not in their own or sectional interest".

Secret Benetifs

The Nigerian government continues to propagate the need to fight incidents of bribery and corruption. The Companies and Allied Matters Act already has this corporate governance problem within its contemplation, as it abhors bribery and corruption in whatever form or guise.

Section 287 of CAMA provides that a "Director shall not accept a bribe , a gift , or a 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".

A breach of this statutory duty entitles the company to recover the actual gift from the Directors, sue him and the giver of the gift, jointly and severally, for damages sustained without any deduction in respect of what the Directors has returned. See Section 287 (2). Also the plea that the company benefited or that the gift was accepted in good faith shall not be a defence. See Section 287 (3).

Loans & Advances With Intent to Defraud

This subject is related to the above on bribery and corruption. The Law does not allow the Directors of a company to obtain loans or other forms of advances with the motive to defraud the company or the giver of the loan or advance. Section 290 of

CAMA provides that if a company receives money by way of an advance payment and with the intent to defraud, fails to apply the money or other property for the purpose for which it was received, every Director or other Officer of the company shall be personally liable to the party from whom the money or property was received.

Other Duties & Liabilities

The Directors of a company can be held personally liable for their executive actions where such actions are not in conformity (i.e. ultra vires) with the company's charter or its objects as set out in its Memorandum and Articles of Association. Also, Directors are personally liable for executive actions aimed at a particular group of shareholders where those actions are fraudulent or illegal.

Traditionally, the liability of Directors and Shareholders of a company are limited. Conversely, a company can by its Memorandum And Articles of Association make the liability of its Directors unlimited from the time of the registration of the company. See Section 288 (1) of CAMA.

Following from the last paragraph above, where a company is already registered, it can by special resolution amend its Articles of Association to make the liability of its Directors unlimited subject to such unlimited liability becoming extinguished on the dissolution of the company.

A Company's Remedies for Breach of Duty

A Company, and not its Shareholders, have numerous remedies open to it where a Director's breach of duty occurs. They include:

- An order of injunction. This is primarily employed against a threatened breach of duty or a continuing breach of statutory duty.
- Compensation and or damages. This is appropriate where a breach has occurred and compensation in the form of restitution is made.
- Rescission of the contract. This is possible where the company is able to show that the alleged contract was ultra vires its objects and it cannot be ratified to the prior knowledge of the third party.
- Restoration of the company's property.
- An order for the Director to render an account of the profits made.
- Summary dismissal of the Director as has been done in some recent cases in Nigeria; some of these cases are presently in Court.

Who Can Challenge A Breach Of Duty?

The general Company Law rule is that it is only the company itself and not its Directors or Shareholders that can contest a wrong done to the company or ratify an irregular conduct. This is known as the rule in *FOSS v. HARBOTTLE*, which has found statutory enshrinement in Section 299 of CAMA .

Some exceptions to this rule, which entitles Shareholders to commence an action in a Court of Law, are provided for in Section 300 of CAMA. They include:

- Entering into illegal or ultra vires transactions.
- Purporting to do by ordinary resolution any act, which by its Articles/Charter or CAMA is required to be done by special resolution.
- Any act or omission affecting the Shareholder's individual rights as a member of the company.
- Committing fraud on either the company or its minority Shareholders.
- Where a company meeting cannot be called on time to be of practical use in redressing a wrong done to the company or to its minority Shareholders.
- Where the Directors are likely to derive a profit or benefit, or have profited or benefited

from the negligence or from their breach of duty.

Conclusion

Shareholders and Directors must be alert to their statutory and corporate responsibilities by ensuring that their companies have in existence a corporate governance policy, in addition to their Articles/Charter and the due processes stated therein are followed. Where this is not done, challenges must be raised and followed to their conclusion to protect the investment of the Shareholders.

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Foreign Companies Doing Business in Nigeria