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Achieving Good Corporate Governance In Public Companies Through Directors' Liabilities: A Multi-Jurisdictional Discourse

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Abstract

Globally, several legislations make provisions for directors' duties and liabilities. These range from Asia, to America, to Europe and Africa. For example, the English Companies Act (CA) 2006 codifies the general duties of directors, replacing previous common law and equity principles concerning directors' duties to the Company. The Nigerian Companies and Allied Matters Act (CAMA), 2020 also specify the roles of directors and make provisions that enhance good corporate governance; and the Kenyan Code of Corporate Governance made similar provisions regarding corporate governance. The quest to achieve good corporate governance in public companies is indispensable judging from corporate failures in other jurisdictions, such as the collapse of corporate giants like Enron and Worldcom, among others. Many stakeholders are interested in how public companies are governed, and this requires that officers, especially directors entrusted with the responsibility of managing them must be above board and would, therefore, be liable for their negligence, omission, commissions, or acts that are inimical towards achieving good corporate governance in those companies. This paper, through the use of comparative, doctrinal, and non-doctrinal approaches, discusses the types of liabilities that directors of public companies can incur and the circumstances under which those liabilities are incurred. The article calls for stiffer sanctions to curb directors' excesses in managing public companies in Nigeria. It recommends robust allowances and adequate prerequisites of office to motivate directors and to discourage fraudulent practices. It concludes that the Company's overall interests must be paramount in all decisions and actions of directors so that the corporate goal can be achieved.

KEYWORDS: *CAMA 2020; Corporate Governance, Public Companies; Directors' Liability.*

1.0 Introduction

Globally, the question of the extent of liabilities of directors of public companies, and most especially, under the Nigerian law, has recently gained currency because of the failure of corporate giants. How can good corporate governance be achieved in public companies? To what extent do directors' liabilities contribute to the success or failure of a public company in Nigeria? When can a director be made personally liable for purported acts of a public company? Is the Company's liability the same as directors' personal liability? What is the extent of the criminal or civil liabilities of new directors, if any, for the acts of past directors? Can directors be liable for the acts of other officers of the Company, say the Company Secretary or the auditors, for instance? These are the major questions that this paper seeks to proffer answers to. The paper will also consider the liabilities of a director primarily under the new Companies and Allied Matters Act ("CAMA") 2020,[1] the UK Companies Act (CA) 2006, case laws, and under the applicable codes of corporate governance, among other relevant laws and statutes.

2.0 Who is a Director?

Under the CAMA 2020, directors are defined as persons duly appointed by a company to direct and manage its business.[2] This includes persons described by the Company as directors, whether executive or otherwise.[3] It follows, therefore, that if any of the members of the managing body are called Trustees, Officers, Governors etc, they are nonetheless company directors by virtue of their powers.[4] Generally speaking, Companies are separate legal entities, but they cannot act on their own; they need people to make decisions and manage them. These people are the directors.[5] Under the UK Companies Act (CA), a public company must have a minimum of two directors and a private company at least one.[6] In Nigeria, under the repealed CAMA,[7] this provision was slightly different as the minimum number of directors for both public

[1] Companies and Allied Matters Act, (CAMA) 2020. The Act will consider whether there is increased liabilities of directors under the Act to determine how they have contributed to good governance of their respective companies.
[2] CAMA, 2020, s. 269 (1). See further *Longe v FBN Plc* (2010) 6 NWLR (Pt. 1189) 1 SC where the Supreme Court, per Oguntade JSC, held inter alia, that "directors are those appointed by the company "to direct and manage the business of the company."
[3] CAMA 2020, s.269 (2).
[4] Ibid.
[5] UK Companies Act (CA) 2006, s. 154.
[6] Ibid.
[7] CAMA, Cap C20, LFN 2004.

and private companies was fixed at two.[8] It is pertinent to note that the new CAMA 2020 toe the line of the UK Companies Act, by providing that any company, not being a small company, shall have at least two directors.[9] The obvious inference from this provision is that small companies can choose to have one director. This new provision is aimed at simplifying business transactions by small companies. The Articles may also fix a maximum number, and the directors may increase the number of directors as long as it is not above the maximum numbers as fixed by the articles,[10] but the general meeting has the power to increase or decrease the number of directors generally. Directors are also persons duly appointed by the Company to direct and manage the business of the Company.[11]

The term 'director' under the CAMA 2020 also provides a shadow director, i.e., a person on whose direction and instructions the directors are accustomed to act.[12] A director acts in a tripartite capacity to the Company. He is an officer, an agent, and an alter ego of the Company.[13] A director is also a trustee of the Company as provided by the CAMA 2020.[14] According to Black's Law Dictionary, a trustee is 'one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.'[15] This means director owes a fiduciary duty to the beneficiaries,[16] of a public company and will be liable if they fail to discharge this duty. Unlike the repealed CAMA 1990 in Nigeria, the CAMA 2020 makes a novel provision for a public company to have at least three independent directors.[17] The meaning of independent directors was extensively provided for in the CAMA 2020.[18] Among others, it defines an independent director means a director of the Company who, or whose relatives separately or together with him or each other, during the two years preceding the time in question, was not an employee of the Company, and was not engaged directly or indirectly as an auditor for the Company.[19] By being

[8] CAMA, Cap C20 LFN 2004, s.246.
[9] CAMA 2020, s.271.
[10] CAMA 2020, s. 274 (3).
[11] CAMA 2020, s. 269; see also *Olufosoye v Fakorede* [1993]1 NWLR (Part 272) 747.
[12] CAMA 2020, s.270 (1).
[13] Bold mine for emphasis.
[14] CAMA 2020 s. 309 also makes the Directors of a company, whether a private company or a public company, trustees of the Company. CAMA 2020, s. 309 (1) provides that "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. 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."
[15] Bryan A. Garner, Black Law Dictionary, 8th edition, USA: Thomson West Publishing, 2004, p. 1553.
[16] The beneficiaries in this case include all the stakeholders such as the shareholders, the management, including the directors themselves, the host community, the government, the employees, the bankers and other financial providers to the company such as the creditors, suppliers of materials and so on.
[17] CAMA 2020, s.275 (1). This provision was not in the repealed CAMA 1990.
[18] CAMA 2020, s.275 (3).
[19] CAMA 2020, s.275 (1) (a) and (d).

independent, corporate governance ethics and principles are being enhanced in that more rooms are given for transparency and financial accountability, among others.

To a large extent, the degree of liabilities of a director depends on the capacity or capacities in which he is acting. In other words, he has liabilities when acting as an officer, as an agent, or as an alter ego of the Company. Directors are the companies' most senior level of management and have the right to partake in the Board of management. They are also the people appointed by the shareholders to manage the Company. The term director can refer to an individual as well as a corporate body. The Managing Director, on the flipside, is a servant of the Company, appointed and removable by the Board of Directors. He will cease to hold office if he ceases to hold office as a director.[20]

2.1 Types of Corporate Boards *vis a vis* Corporate Governance

Most countries in the European Union and many Asian countries have two separate boards, an executive board for the day-to-day business and a supervisory (oversight) Board (elected by the shareholders) for supervising the Executive Board.[21] In these countries, the Managing Director presides over the Executive Board, while the Chairman presides over the Supervisory Board. Thus, these two roles are always held by different sets of people. This is to ensure a distinction between management by the executive board and governance (oversight) by the supervisory Board. This allows for clear lines of authority, with the aim of preventing a conflict of interest and over-concentration of power in the hands of one person. It is also meant to enforce a standard of statutory control over the affairs, especially the financials of the company. In Nigeria, most public companies still have one Board of Directors. However, what the dual Board aims to achieve is what the Nigerian Code of Corporate Governance (NCCG) 2018 is set to achieve in Nigeria. Out of the five sectoral Codes of Corporate Governance in Nigeria, one is for public companies, namely, the Code of Corporate Governance for Public Companies in Nigeria 2011, issued by the Securities and Exchange Commission.[22] The remaining four Codes are the Code of Corporate Governance for the Telecommunication Industry 2016, issued by the Nigerian Communications Commission;[23] the Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014, which was issued by the Central Bank of Nigeria;[24] the Code of Good Corporate Governance for Insurance Industry in Nigeria 2009, which was issued by the National Insurance Commission (NAICOM); and the Code of Corporate Governance for Licensed Pension Fund Operators 2008, issued by the National Pension Commission (PENCOM). The Nigerian Code of

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[20] CAMA 2020, s.88 (b). See also, *Yalaju-Amaye v A.R.E.C. Ltd* [1990]4 NWLR (Part 145) 425.

[21].Culled from https://www.coursehero.com/file/p4h3psc/The-minimum-of-members-a-board-can-consist-of-is-three-the-maximum-21-The/ accessed 4 June 2021.

[22] This Code replaced the 2003 SEC Code.

[23] This Code replaced the 2014 NCC Code.

[24] This replaced the 2006 CBN Code.

Corporate Governance 2018[25] seeks to institutionalise corporate governance best practices in Nigerian companies. The Code also aims at promoting public awareness of essential corporate values and ethical practices capable of enhancing the integrity of the business environment. By institutionalising high corporate governance standards, the Code equally aims to rebuild public trust and confidence in the Nigerian economy, thus promoting increased trade and investment. Companies with effective boards and competent management that act with integrity and that are engaged with shareholders and other stakeholders are better placed to achieve their business goals and contribute positively to society. In such well governed organisations, the interests of the Board and management are aligned with those of the shareholders and other stakeholders.[26]

In the US, the Board[27] is often equivalent to the supervisory Board, while the executive Board comprises the CEO and their direct reports.[28] Individual directors usually serve on more than one Board. The effect of this practice is interlocking directorate.[29] This situation is not ideal as it can have adverse social, economic, corporate, and legal consequences. There are different types of directors, but for the purpose of this paper, we shall concentrate on the two major ones: the executive and the non-executive directors.[30]

Executive Directors: These are officers holding service contracts of the company, appointed to the Board in a two-tier system comprising executive and non-executive directors. Executive Directors are often employees too, and the company as an employer is represented on the Board by directors who are employees. These are members of the Board of directors but are also full-time employees with clear executive roles. They are responsible for the everyday management of the company, and their powers are usually circumscribed by the articles.

Non-Executive Directors (NED): A Non-executive Director discharges his functions on a part-time basis because he is not an employee of the company. In many

[25] The Nigerian Code of Corporate Governance (NCCG) was issued in 2018 by the Financial Reporting Council of Nigeria (the "FRCN") pursuant to Sections 11(c) and 41(c) of the Financial Reporting Council of Nigeria Act, 2011. The issuance of the Code stemmed from the suspension of the National Code of Corporate Governance 2016 (the "2016 Code") by the Federal Government of Nigeria. The Code, which is aimed at companies of varying sizes across different industries, seeks to institutionalise corporate governance best practices and promote public awareness of essential corporate values and ethical practices that will enhance the integrity of the business environment. The FRCN, through sectoral regulators and registered exchanges, will monitor the implementation of the Code and may, in this regard, conduct periodic reviews on the implementation of the corporate governance principles that are frequently deviated from by companies.

[26] Nigerian Code of Corporate Governance (NCCG) 2018 P.iv.

[27] In the US, the Board of Directors is elected by the shareholders.

[28] These direct reports are the other C-level officers, division or subsidiary heads.

[29] Interlocking directorship is a situation where a relatively small number of individuals have significant influence over a large number of important entities.

[30] The other types of directors are the shadow directors, Alternate directors, Nominee directors and de facto directors. We have earlier given the meaning and the importance of independent directors to corporate governance. See notes 18 and 19 above.

cases, he possesses special expertise and knowledge in the specific industry in which the company is engaged. He is required to take impartial decisions, particularly where the other directors have personal interests, such as their remuneration.[31] He is a member of the Board without executive responsibilities in the company. A NED is not an employee of the company of which he is a NED. However, because he is a director, he is legally liable in the same way as an executive director but only in his oversight, that is, supervisory duty. The criteria for selecting a NED are varied, and consideration needs to be given by the Board (or by any appointed nomination committee of the Board[32]) as to the qualities and experience required for the role. Therefore, NEDs are usually expected to contribute judgment and objectivity to the deliberations of the Board by bringing relevant expertise from outside the company. A NED has to understand the company's business, with requisite knowledge and experience he might have obtained in his working career or other aspects of economic and public life. In order to further strengthened corporate governance in Nigerian public companies, the CAMA 2020 provides for at least three independent directors on the Board of public companies.[33]

3.0 The Principle of Corporate Legal Personality

It has been held in *Adeyemi v Lan & Baker (Nig) Ltd*,[34] that:

> …[a] Limited Liability company only exists in the eye of the law; it can only operate by means of human beings; usually a company acts through its human agents such as directors, managers, and officers whose actions can be attributed to that of the company.

Thus, the principle of corporate legal personality is enshrined in the Nigerian Company Law as reflected in section 42 of the CAMA 2020. The section codifies the common law position established in the case of *Salomon v Salomon Ltd*.[35] There are, however, exceptions to the corporate legal personality principle. These exceptions became essential as a result of the recognition that the 'corporate legal entity' and the 'limited liability doctrines' (which now include Limited Liability Partnership under the CAMA 2020),[36] could be abused. The benefits of such abuse should, therefore, not be enjoyed by the abusers. Depending on the circumstances, therefore, the veil of incorporation may be lifted, thereby making the directors personally liable as opposed to corporate liability. For instance, under section 316 of the CAMA 2020, the directors will be personally liable provided there is the intent to defraud. In Nigeria, the principle of corporate legal personality is further strengthened by the provision of section 89 of the CAMA 2020, which states that:

[31] Culled from http://www.ukincorp.co.uk accessed 22 May 2021.
[32] Especially as applicable in the United States.
[33] CAMA 2020, s.275 (1).
[34] (2000) 7. NWLR (Pt.663) 33 at 48.
[35] *Salomon v A Salomon & Co* Ltd [1897] AC 22.
[36] See CAMA 2020, Part C (sections 746-794).

> Any act of the members in general meeting, the Board of directors or of a Managing Director while carrying on in the usual way the business of the company shall be treated as the act of the company itself, and the company shall be criminally and civilly liable thereof to the same extent as if it were a natural person.[37]

This provision indicates that the company is vicariously liable for: (i) any act of the members in general meeting; (ii) any act of the Board of directors and; (iii) any act of the Managing Director as long as same is done in the discharge the ordinary business of the company. In other words, the import of section 89 of the CAMA 2020 is that a company is vicariously liable both for the criminal and civil acts of its directors, its member while acting at a general meeting and its Board of directors, provided any of them is acting within the powers allocated to them both under the law and under the Company's Constitution. Quite instructive in this regard is the provision of section 90 (3) of the CAMA 2020, which provides that "Nothing in this section shall derogate from the vicarious liability of the company for the acts of its servants while acting within the scope of their employment." Given that the company is vicariously liable for acts of its servants done within the scope of employment, it then follows that a company can be sued in its corporate name for acts contemplated in this regard.

The position under the Nigerian law is not entirely different from that of English law. Under the English law, a principal is liable for the fraud of his agent committed in the course of his (agent's) employment (not beyond the scope of his agency). It does not matter whether the fraud was committed for the principal's benefit or not.[38] According to Atkin J. in *Mousell Bros. Ltd v London and North Western Ry Co*,[39] the test of determining whether the duty imposed by a statute is vicarious or personal depends on:

> The object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.

Meanwhile, Pinto and Evans, in helping to clear the fog on the position under the common law position in criminal cases stated as follows: "At common law, a principal is not responsible for the act of his agent unless he has commissioned (or "commanded") the offence; the doctrine of…vicarious liability forms no part of the criminal law of England and Wales."[40]

[37] See also https://nigerianlawclaz.blogspot.com/2018/04/capacity-to-act-as-principal-under.html accessed 23 May 2021.

[38] See Lloyd v Grace, Smith & Co. [1912] A.C. 716 at 731 HL.

[39] [1917] 2 K.B. 836, 845.

[40] Pinto and Evans, "Corporate Criminal Liability," Sweet & Maxwell, London, Second Edition (2008), pp. 19 - 20.

4.0 The Liability of a Director

When officer and director liability happens, the corporate veil will be pierced or lifted, and the officer or director responsible for the liability will be exposed to bear the full brunt of the law. The director is required to act in good faith and use care in a situation the way a normal person would in similar situation. The business judgment rule aims at protecting directors as long as the decision he made is in the company's overall best interest and in good faith. This is the advantage of a limited liability company because it protects people from liability for the actions and debts of the company. Notwithstanding this, there are circumstances where the Court will hold officers, directors, and shareholders liable. This is to avoid grounding the company under the guise that whatever the directors do will be borne by the company. This will happen where the Court believes that the acts of the director were not for legitimate purposes. If the business and the owners are the same, courts will not allow such owners to benefit from limited liability. The CAMA 2020 also provides that **'**Where a person not duly appointed as a director acts as such on behalf of the company, his act does not bind the company, and he is personally liable for such action, but where it is the company which holds him out as director, the company is bound by his acts.'[41] This provision underscores the importance of due diligence in the appointment of directors, especially of public companies.

The CAMA 2020 equally provides that 'A director shall not accept a bribe, a gift, 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.'[42] The Act provides further that 'if a director contravenes this law, he commits a breach of duty and the company shall recover from the director the actual gift and sue him and the other person for damages sustained without any deduction in respect of what the director has returned.[43] The fact that the company benefitted from such secret profits will not absolve the concerned director from liability.[44] These provisions are commendable as public confidence is likely to increase in the way such companies are governed, thus promoting good corporate governance.

4.1 Determination of what amounts to Good Faith of Directors.

Firstly, the Court will look at the directors' duties and responsibilities and asks what a reasonable person with general skills and knowledge would do in the circumstance. It is a test to determine if the director has the minimum threshold of competence to perform the role. Secondly, the Court will also look at their skill, experience, and knowledge as a subjective test. Directors' oversight liability is based on the concept of good faith. For instance, if an insolvency practitioner discovers that a director is acting in wrongful trading that does not maximize the company's returns when the

[41] CAMA 2020, s. 276.
[42] CAMA 2020, s.313 (1).
[43] CAMA 2020, s.313 (2).
[44] CAMA 2020, s.313 (4).

company is insolvent, such a director will be personally liable for the company's debts during the period. Directors are expected to first of all, act in the best interests of the creditors first, once they understand the financial position of the company. They should also communicate clearly with creditors and shareholders, and act on professional advice in finding new business and in debt management.

4.2 The nexus between the Director's Liability and Good Faith

The obligation of a director encompasses acting in good faith with corporate information and reporting, which the Board deems correct. Not doing this will make the director liable for losses due to non-compliance. Directors are at risk if they act passively or fail to oversee the compliance programme. The Board must be trained to identify warning signs and oversee compliance. A company director will be liable when he fails to implement an information system or if, while implementing it; he fails to oversee its operations. Directors should implement compliance and monitoring programmes within the business, and oversee the programmes for possible breach. In the event of breach, directors should, in good faith, stop the wrongdoing from continuing. A director acting in good faith should ensure that there is corporate information and reporting system which he should timeously complied with in accordance with the law. This can be done with the assistant of the company secretary, who is expected to be on top of compliance matters in the company. The Board can limit oversight liability for the directors and the company by engaging an outside company as independent counsel and investigate potential fraud claims, among others.

5.0 Corporate Governance and the Duties of Directors

The roles of directors and directors' duties and compliance generally relate to corporate governance issues and a breach of same. Corporate governance is "the system by which companies are directed and controlled."[45] In a company, it encompasses a set of relationships between its management, Board, shareholders, and other stakeholders. It also deals with the prevention or reduction of the conflict of interests of stakeholders. In public companies for instance, there are several ways of reducing or preventing these conflicts of interests. These include the policies, laws, processes, customs, and institutions which have an impact on a company's administration. An important issue in corporate governance is the nature and extent of accountability of people in the business, and the various mechanisms put in place to decrease the principal-agent problem. Corporate governance also includes the relationships among the many stakeholders involved and the goals for which the company is governed.[46] However, a breach of these duties is tantamount to liability and failure of their oversight responsibilities over the company. This is similar to 'responsibility and punishment'; obligation and failure; duty, breach, and liability for

[45] http://oer2go.org/mods/en-saylor/content/www.saylor.org/site/textbooks/corporate%20governance.docx, accessed 4 May 2021.
[46] OECD Principles of Corporate Governance, 2004.

breach. Globally, directors' duties, therefore, and the liability for failure are one of the most debated issues in respect of the company law reform.

5.1 The Duties of Directors

On the flip side of a "liability" is a duty, and in contrast, the birth point for the liability is the duty; therefore, in analysing "what a director is and the liability for failure in carrying out his duties" it is pertinent to consider the duties of directors as they drive the business of the company. In doing this, a cursory look at the UK Companies Act (CA), 2006 provision on the capacity of a company and power of directors to bind it is relevant; amongst other legislations, e.g., the Nigerian CAMA 2020, etc. These duties referred to the directors' obligations to the company and characterised according to duties, responsibilities, and liabilities. All directors, regardless of their nomenclature, have the same duties, responsibilities, and liabilities towards the company.

5.2 Directors' Fiduciary Duty

Section 305 of the CAMA 2020 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.' The Act further provides in section 305 (3) that "a director shall act at all times… in the best interest of the company… 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 skillful director will act in the circumstances". Thus, in *Okeowo v Migliore,*[47] it was held that the directors' fiduciary duty is not for any individual director's advantage but the advantage of the company. Section 305 (9) of the CAMA 2020 makes any duty imposed on a director under section 305 enforceable against the director by the company and not its shareholders. This provision follows the rule in *Foss v Harbottle.*[48]

Secret Profits by Directors

Section 306 (1) of the CAMA 2020 provides that a director's personal interest shall not conflict with his duties as a director in a company. In the course of management of the company;… a director shall not make any secret profit or achieve other unnecessary benefits.[49] Also, 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.[50] 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 the company's confidential information upon his ceasing to be a director of the

[47] [1979] NSCC 210 @ 263.
[48] [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.
[49] CAMA 2020, s. 306(2).
[50] CAMA 2020, s. 306(3).

company.[51] 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 case of *Nasr v Beirut-Riyad Nigeria,*[52] 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; otherwise, the company can maintain an action for damages and or restitution.

5.3 Duty of Care and Skill, Transparency and Honesty

Persons standing in a fiduciary relationship to another must exercise a duty of care in managing the relationship. Thus, section 308 (1) of the CAMA 2020 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 308 (2) of CAMA 2020 further provides that "failure to take reasonable care in accordance with the provisions of section 308 of this Act shall be ground for an action for negligence and breach of duty."[53]

On the issue of secret benefits, the Nigerian government continues to propagate the need to fight incidents of bribery and corruption. The CAMA 2020 already has this corporate governance problem within its contemplation, as it abhors bribery and corruption in whatever form or guise. A breach of section 313 of CAMA 2020[54] will entitle the company to recover the actual gift from the director, sue him and the giver of the gift, jointly and severally, for damages sustained without any deduction in respect of what the directors have returned.[55] It is also not a defence that the company benefited or that the gift was accepted in good faith.[56]

Closely related to the issue of bribery and corruption is loans and advances with intent to defraud. The law prevents directors of a company from obtaining loans or other forms of advances with the motive of defrauding the company or the giver of the loan or advance. Section 316 of CAMA 2020 provides that if a company receives money through 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

[51] CAMA 2020, s. 306 (5).
[52] [1968] 5 NSCC 218.
[53] CAMA 2020, s. 308 (3) 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.
[54] CAMA 2020, s. 313 (1) 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."
[55] CAMA 2020, s.313 (2).
[56] CAMA 2020, s.313 (3).

other officer of the company shall be **personally liable**[57] to the party who advanced the money or property. The memorandum of a limited company may also make the liability of directors and other officers unlimited.[58] In a limited company in which the liability of a director …is unlimited, the directors and the member who proposes a person for election or appointment to the office of director…, shall add to that proposal a statement that the liability of the person holding that office is unlimited, and before the person accepts the office or acts therein, notice in writing that his liability are unlimited is given to him by the promoters of the company...[59] Without any doubt, corporate governance would be highly enhanced by this provisions since directors are aware that their liabilities are unlimited if they commit any fraud on behalf of the company they governed.

Other Duties and Liabilities

Directors of a company can also be **personally held liable** for their executive actions where such conducts are not in conformity with the company's objects or beyond their powers (i.e., *ultra vires*) as set out in its Memorandum and Articles of Association. Also, directors are **personally liable** for actions aimed at a particular group of shareholders where those actions are fraudulent or illegal. Originally, the liability of Directors and Shareholders of a company was limited. However, by its constitution,[60] a company can make the liability of its Directors unlimited from the time of the company's registration.[61] Following this, 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.

1.4 A Company's Remedies for Breach of Duty

A Company, and not its Shareholders, has various remedies at its disposal where a Director's breach of duty occurs. These include: An order of injunction. This is usually employed against a threatened breach of duty or a continuing breach of statutory duty. We also have Compensation and or damages, which is used where a breach has occurred, and compensation in the form of restitution is made. Rescission of the contract is another remedy. This happens where the company successfully proves that the alleged contract was *ultra vires* its objects. Also, another remedy is the restoration of the company's property and rendering the account of the profit made. Finally, the director concerned might be summarily dismissed.

In the UK, the statutory statements in the CA 2006 codify the general duties of directors, replacing previous common law and equitable principles in relation to

[57] Bold mine.
[58] CAMA 2020, s. 314 (1).
[59] CAMA 2020, s. 314 (2).
[60] That is, the Memorandum and Articles of Association.
[61] CAMA 2020, s. 314(1).

directors' duties to the company. However, the Act makes it clear that regard must be made to such previous common law and equitable principles when interpreting the statutory statements. The CA 2006 introduces the provisions in respect of directors' duties in two tranches – in October 2007 and in October 2008.[62] Concerning the duties of directors, a person who is not a director might be given a title to show his status or the special responsibilities he performs. A non-statutory director may bind the company even though he is not entitled to attend board meetings.

On the issue of Responsibilities – The law imposes various obligations on public companies, which require directors to ensure that the public company complies with certain minimum requirements[63] – standards (corporate governance), and provides penalties for breach (Liabilities) of these statutory duties. The statutes include the UK Companies Acts 2006, the UK Insolvency Act 1986, and the UK Financial Services Act 1986. In Nigeria, these include the CAMA 2020, the Nigerian Deposit Insurance Corporation Act (NDIC Act),[64] the Central Bank of Nigeria Act (CBN Act),[65] and the Banks and other Financial Institutions Act (BOFIA).[66] In the United States, the Sarbanes-Oxley Act, and other legislation such as those relating to employment, tax, and audit, amongst others, is also apt here.[67]

These duties as prescribed in the CA are on all fours with the duties of directors as also provided in the CAMA 2020[68] and range from their position as fiduciaries to the Company, as agents, the duty to act within powers,[69] the duty to promote the success of the company,[70] duty to exercise independent judgment,[71] the duty not to allow a conflict of his duties with his personal interest,[72] duty of reasonable care, skill and diligence,[73] duty not to accept benefits or rewards from third parties[74] and the duty to declare interest in proposed transaction or arrangement.[75] In addition to the general duties, section 182 of the UK Companies Act 2006 requires a director to declare a direct or indirect interest in an existing transaction or arrangement. It is a criminal offence if a director does not comply.[76] As stated earlier, the company, like a car, is technical, and to successfully drive same, it is important that the director understands the manual. The manual, in this case, is the standards encapsulated in the various regulations and statutes guiding the establishment and running of

[62] CA 2006, Ss. 171-182.
[63] Culled from https://www.justanswer.com/european-law/6v9zx-ra-phi.html accessed 4 June 2021.
[64] The Nigerian Deposit Insurance Corporation Act, Cap N102, LFN 2004.
[65] The Central Bank of Nigeria Act, 2007.
[66] The Banks and other Financial Institutions Act, Cap B3, LFN 2004.
[67] Culled from http://www.ukincorp.co.uk, accessed 25 May, 2021.
[68] Sections 305, 306, 307, 308, 309 and 314.
[69] CA, s. 171.
[70] CA, s. 172.
[71] CA, s. 173.
[72] CA, s. 175.
[73] CA, s. 174.
[74] CA, s. 176.
[75] CA, s. 177.
[76] Luke Thomas & Lorraine Youn, 'Corporate Secretaryship' 2008, 5th edition.

companies globally and which provide for directors duties and liabilities for failure to carry out the same.

6.0 The Board of Directors' Duty of Oversight - Defining the Duty and inherent Liability[77]

The Enron[78] WorldCom, Adelphia,[79] and other corporate crises have led to widespread concern over the adequacy of corporate governance practices of many companies. In Nigeria, the Cadbury Plc crisis, the creation of the Asset Management Corporation of Nigeria (AMCON) and the resultant nationalisation of three publicly quoted companies[80] by the CBN and NDIC also bear testimony to the global corporate crisis and cause for concern over the adequacy of corporate governance practices and efficiency of directors oversight functions. The focus of this scrutiny has centered on the financial disclosure, audit committee, business practices, and board independence requirements of public companies. In this wise, boards of directors are seeking increased guidance regarding the proper discharge of their responsibilities to supervise and monitor the company's management and affairs.

The Board is usually responsible for two primary functions: decision making and oversight. Concerning decision making, the Board of directors' duty of care, mandates directors to act in good faith and with such a degree of care that an ordinary person would use under similar circumstances. Most directors are equally aware of the protections afforded by the business judgment rule.[81] Within the oversight context, however, directors will not be so protected by the business judgment rule[82] if, for

[77] Corporate Responsibility: The Board of Directors' Duty of Oversight Part I - Defining the Duty; By: Haynes and Boone, LLP; August 26, 2002 - Texas, USA.

[78] The Enron scandal, revealed in October 2001, eventually led to the bankruptcy of the Enron Corporation, an American energy company based in Houston, Texas, and the dissolution of Arthur Andersen, which was one of the five largest audit and accountancy partnerships in the world. In addition to being the largest bankruptcy reorganization in American history at that time, Enron was attributed as the biggest audit failure.

[79] Adelphia Communications Corporation (former NASDAQ ticker symbol ADELQ), was a cable television company headquartered in Coudersport, Pennsylvania. Adelphia was the fifth largest cable company in the United States before filing for bankruptcy in 2002 as a result of internal corruption. Adelphia was founded in 1952 by John Rigas in the town of Coudersport, which remained the company's headquarters until it was moved to Greenwood Village, Colorado, shortly after filing for bankruptcy.

[80] Afribank Plc (now Mainstreet Bank Ltd), Bank PHB Plc (now Keystone Bank Ltd) and Spring Bank Plc (now Enterprise Bank Ltd).

[81]The *best judgement rule* is to the effect that courts will not second guess directors' business decisions if the directors act on an informed basis and in good faith.

[82]The business judgment rule is a United States case law-derived concept in corporations law whereby the "directors of a corporation… are clothed with [the] presumption, which the law accords to them, of being [motivated] in their conduct by a bona fide regard for the interests of the corporation whose affairs the stockholders have committed to their charge. To challenge the actions of a corporation's board of directors, a plaintiff assumes "the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty — good faith, loyalty, or due care". Failing to do so, a plaintiff "is not entitled to any remedy unless the transaction constitutes waste . . . [that is,] the exchange was so one-sided that no business person of ordinary,

whatever reason, they fail to take action when accused of corporate impropriety or where they take action deliberately to the detriment of the company. Under this segment, we will define the standard of care applicable to oversight, identify typical applications of the duty, and explore the liability of directors under the duty of oversight.

6.1 Liability under the Duty of Oversight

Under the duty of oversight, liability arises from the Board's failure to act in situations in which due or more careful attention would have prevented corporate misconduct, breach of law, or a corporate loss. To succeed in a suit for lack of oversight claim, a plaintiff must show that the directors knew or should have known that breach of law or improper conduct were occurring, that the directors fail to take steps to prevent or remedy the misconduct, and that their failure in this regard proximately caused the losses. Breaches of the duty of oversight usually occur when directors abdicate their fundamental functions. Instances of such abdication of fundamental functions are when directors fail to supervise and monitor management; where they lack adequate knowledge of the company's business, affairs, and activities; where directors are informed of employee wrongdoing or potential breaches of law, and they fail to investigate and take action concerning the situation; where directors delegate corporate managerial responsibility to an untrustworthy officer or employee and where they fail to monitor such officer or employee, audit malfunctions, etc. If corporate governance is all about managing a company well to achieve its corporate goals, it follows that any company where directors are so carefree or negligent, as seen here, should be held liable for the resulting liabilities.

When a loss emanates from the failure of the Board to consider a problem, or where there has been no process, or where there is no decision to protect, the business judgment rule will not apply. Instead, directors may incur liability for breach of the duty of oversight. Instead of having a court defer to the directors' business judgment, the directors may be required to defend a negligence claim or be prosecuted criminally. Therefore, when directors are aware, or should be aware, of material improper conduct, the breach of the law, or other action capable of resulting in material harm to the company, the duty of oversight requires the directors to investigate the matter and decide whether corrective action is needed or not. In the absence of this, the Board will be criticised for failure to supervise and may face liability under the duty of oversight.[83] Thus, the duty of oversight creates an incentive for boards to respond to potential signals of wrongdoing so as to gain the benefit of the business judgment rule.

Boards can also be held liable under the duty of oversight if they fail to act when they know, or are expected to know of wrongdoing. At times, Boards may have difficulty determining whether warning signs are sufficient enough to attract their attention.

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sound judgment could conclude that the corporation has received adequate consideration". This rule is applicable in various company law statutes globally.

[83] CAMA 2020, s. 300; CA 2006, s. 178; exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 491.

However, Boards are expected to know that these situations will be viewed in hindsight, that is, that the information in question will be overwhelming following the occurrence of the calamity. It follows, therefore, that the impetus to investigate, supervise employees, and evaluate warning signs is strong. These include the review, monitoring, and supervision of executive decisions, authorizations, appropriations, investigations, programs, activities, and policy implementation. Sometimes, it exercises this power mainly through its committee system. The Boards' oversight authority in the case of Nigeria derives from its "implied" powers under the CAMA 2020. In Nigeria, the combined provisions of sections 305 to 316 of the CAMA 2020 imposes on the Board, the obligation of due care and skill in the preparation of their financial statements. However, other jurisdictions have specific rules guiding this, and we shall look at them hereunder.

6.2 Standards of Directors' liabilities for oversight failures[84]

Directors' oversight liability is based on the concept of good faith. Generally, a director's obligation includes a duty to attempt in good faith to assure that there is in existence, corporate information and reporting system adjudged accurate by the Board. Failure to ensure that this is in place may, under some circumstances, render a director liable for losses that are caused by non-compliance with applicable legal standards. This was so held in *Re Caremark International, Inc. Derivative Litigation*.[85] In other words, directors may be at "risk if they fail to reasonably oversee the compliance programme of the company or act as mere passive recipients of information."[86] When a warning sign appears, this duty of care requires reasonable investigation and diligence. Directors' liabilities resultantly arise because of their position as agents, or officers, or trustees of the company, having fiduciary relationship and positions of good faith with the company and its shareholders.

Some of these liabilities are in tort; some are in contract, some under the criminal law while others are statutory, that is, under the CA 2006, the CAMA 2020, the Sarbanes-Oxley Act 2002, the CBN Act,[87] and other laws. In deciding the liability of Directors, the courts have taken into consideration, a director's position as a whole, and thereby interpreted that the standards of liability expected for oversight failures herewith are very strict. However, maintaining strict compliance by the Board themselves has been the question and the result of the collapses of several publicly quoted companies.[88] But, statutorily, as far as fiduciary duties or obligations are concerned, any breach by any director would visit them with the strictest of liability.[89]

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[84] Culled from http://www.companydirectors.com.au/Director-Resource-Centre/Director-QA/Director-Liability, accessed 25 May 2021.
[85] 698 A.2d 959 (Del. Ch. 1996).
[86] (See The Office of Inspector General of the U.S. Department of Health and Human Services and the American Health Lawyers Association, Corporate Responsibility and Corporate Compliance: A Resource for Healthcare Board of Directors.)
[87] The Central Bank of Nigeria Act (and subsidiary legislations thereto).
[88] *Cook v Deeks* [1916] A.C. 554.
[89] CAMA 2020, s.341.

The following test of standards for directors' liability which are an offshoot of the statutory duties, was constructed in the opinion of *Grobow v Perot*,[90] as a guideline for the satisfaction of the business judgment rule; viz: Directors in a business should, therefore: act in good faith; act in the best interests of the company; act on an informed basis; not be wasteful; not involve self-interest (duty of loyalty concept plays a role here); not involve in Insider Trading; and not involve in Insolvent Trading.

6.3 Remedies for Failure

There are many available remedies in the event of a breach by the directors of their oversight duties are provided by law in most jurisdictions. For instance, in the UK Companies Act 2006, s. 178 provides what the consequences of a breach in respect of the general duties of directors are. Other jurisdictions have specific rules that apply in the case of a breach. Examples are the Nigerian NDIC and CBN Acts, the United States Sarbanes-Oxley Act,[91] the UK Insolvency Act (IA) 1986,[92] the UK Company Directors Disqualification Act 1986, the tax laws of various jurisdictions, amongst others. The Sarbanes–Oxley Act,[93] for example, was enacted in reaction to some major corporate and accounting scandals,[94] including those affecting Enron, Tyco International, Adelphia, Peregrine Systems, and WorldCom, and it has introduced new standards of accountability on boards of US companies or companies listed on the US stock exchanges.[95] Most companies covered by the Act have hired internal auditors to ensure that the company adheres to required standards of internal control. The internal auditors are, by law, required to report directly to an audit board, consisting of directors of which more than half must be outside directors, and one of them must be an accounting expert. The remedies, therefore, include the

[90] 539 A.2d 180 (Del. 1988).

[91] The Sarbanes–Oxley Act of 2002 (Pub. L. 107-204, 116 Stat. 745, enacted July 29, 2002), also known as the 'Public Company Accounting Reform and Investor Protection Act' (in the Senate) and 'Corporate and Auditing Accountability and Responsibility Act' (in the House) and more commonly called Sarbanes–Oxley, Sarbox or SOX, is a United States federal law that set new or enhanced standards for all U.S. public company boards, management and public accounting firms.

[92] IA 1986, s. 214 deals with wrongful trading in certain circumstances.

[93] The Act contains 11 titles, or sections, ranging from additional corporate board responsibilities to criminal penalties, and requires the Securities and Exchange Commission (SEC) to implement rulings on requirements to comply with the law. Harvey Pitt, the 26th chairman of the SEC, led the SEC in the adoption of dozens of rules to implement the Sarbanes–Oxley Act. It created a new, quasi-public agency, the Public Company Accounting Oversight Board, or PCAOB, charged with overseeing, regulating, inspecting and disciplining accounting firms in their roles as auditors of public companies. The act also covers issues such as auditor independence, corporate governance, internal control assessment, and enhanced financial disclosure. The nonprofit arm of Financial Executives International (FEI), Financial Executives Research Foundation (FERF), completed extensive research studies to help support the foundations of the Act.

[94] These scandals, which cost investors billions of dollars when the share prices of affected companies collapsed, shook public confidence in the nation's securities markets.

[95] Under the Act, directors risk large fines and prison sentences in the case of accounting crimes. Internal control is now the direct responsibility of directors.

following[96]: derivative claims;[97] injunction or declaration;[98] damages or compensation; relief on the grounds of unfairly prejudicial conduct;[99] restoration of the company's property;[100] rescission of the relevant contract; investigation of the company by the commission;[101] and/or other regulatory body;[102] account of profits; disqualification;[103] summary dismissal; and winding up on just and equitable grounds.[104]

6.4 Directors Liability for Company Tax Transgressions and Financial Crisis

Under some circumstances, directors may be personally held liable for certain tax liabilities of the company in which they serve. These legal measures were largely instituted to deter companies from preferring other creditors for the sake of the tax authorities. Since remedies against a company are generally limited to its assets, a company in financial crisis has an incentive to "borrow" from the tax authorities by not remitting third party taxes (such as wage deductions) to satisfy other creditors' claims. One way of discouraging this type of behaviour is to influence the company's directing mind.[105] To reduce this risk, directors should be proactive in ensuring compliance with tax statutes. Failure to be so proactive might result in an unwanted surprise in the form of personal liability for the tax liabilities of the company. To reduce the risk of personal liability, directors should ensure appropriate delegation, risk management when the corporation is in financial crisis, and active participation on the Board of directors. In some instances, it may be sufficient for a director to delegate the tax remittance functions to managers, especially if the director is an outside director of a large public company. It is also important to ensure that the accounting function has been entrusted to someone knowledgeable, trained, and aware of the relevant tax laws.

There are also some of the decisive steps directors may take when they become aware of financial difficulty include attempting to increase the company's line of credit with its bank, coming to an arrangement with the bank that would enable the company to make remittances, setting up controls to account for remittances, asking for regular

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[96] Specific details of these remedies are available in the respective statutes mentioned in this piece, viz: the UK Companies Act 2006, the CAMA 2020, etc.

[97] CA 2006, ss. 260 – 269; CAMA 2020 ss. 346 – 352.

[98] CAMA 2020, ss. 341 – 343.

[99] CAMA 2020, ss. 353 – 354.

[100] CA 2006, ss. 190 – 196.

[101] The Corporate Affairs Commission (CAC), CAMA 2020, ss. 357 – 358; *Spectra Ltd. v Stabilini Visionini Ltd.* [1996]6 NWLR (Pt.44) 239.

[102] Ss. 26, 29, 37, and 47 of the CBN Act and the BOFIA gives the CBN general powers to regulate banks and other financial institutions.

[103] UK Company Directors Disqualification Act (CDDA), 1986; Re Produce Marketing Consortium Ltd. (No. 2) (1989).

[104] CAMA 2020, s.571.

[105] See Ryan Morris and Les Chaiet "On the Hook: Directors Liability for Corporate Tax Transgressions" culled from Directors%202/OntheHook-DirectorsLiability.pdf accessed 16 May 2021.

reports from the company's financial officers on the ongoing use of such controls, and obtaining confirmation at regular intervals that withholding and remittance have taken place. A director can also look at other means of relieving the financial crisis, such as recovering outstanding amounts owing to the company or seeking new sources of capital.

A cursory look at some provisions of tax law in Nigeria equally shows that a director can be criminally liable for crimes committed while discharging his duties. For example, section 94 (1) of the Companies Income Tax Act (CITA)[106] provides, among others, that where any person other than a company who, obtain any deduction, set-off, or repayment in respect of tax for any company, or who in return, account or particulars made or furnished with reference to tax, knowingly makes any false statement or false representation, is guilty of an offence and liable on conviction to a fine… or to five years imprisonment, or to both such fine and imprisonment.[107]

One can infer from this provision that the intention of the drafters of the law is not to make a person who does not have the intention to commit the crime created punishable for same but to punish only the person who "knowingly" does the offence created under the law. This provision is quite consistent with the basic principle of criminal law that the two elements of a crime – *actus rea* and *mens rea*- must be present before any conviction can be secured, the only exception being strict liability offences. Considering the provisions above, we are of the view that it is not the intention, or better still; it has never been the intention of the lawmakers to make someone who never had the *mens rea* of a crime punishable for same either under CAMA 2020 or even under CITA.

7.0 The Judicial Disposition to a Company's Liability vis-à-vis the Liability of a Director

In *Yesufu v Kupper International N.V.*,[108] the Court considered the liability of a company and held that where a director enters into a contract in the name of a company or purporting to bind the company, it is not the director but the company tthat will be liable. It was further held that the director is not personally liable unless it appears that he undertook personal liability. Similarly, in the case of *Kurubo v Zach-Motison (Nigeria) Ltd*,[109] regarding the liability of a company, the Court opined thus:

[106] Cap C21, LFN 2004.
[107] It is noteworthy that instead of stipulating a particular amount as the penalty, the CAMA 2020 just make provisions, as the case may be, by referring to the Corporate Affairs Commission's Companies Regulations 2021, by stating that the concerned person or officer shall be liable in case of a particular breach of the Act and subject to fine as specified in the Commission's Rules. This is a good improvement over the repealed CAMA 1990 (later cited as Cap.C20 LFN 2004) because of the unstable Naira value vis-à-vis other major currencies of the world.
[108] *Yesufu v Kupper International N.V.* (1996) 5 NWLR (Pt.446)17.
[109] *Kurubo & Anor v Zach - Motison (Nig) Ltd* (1992) 5 NWLR (Pt. 239) 102.

> In view of the fact that an artificial person or company vested with legal or juristic personality lacks the natural or physical capacity to function as a human being, those who work in it do all things for and on behalf of it…It is therefore the law and the tradition for the human beings authorised to negotiate agreement for and on behalf of the company. Where an agreement is so executed by a person in authority, the company is liable or deemed to be liable for the act or acts of the person.[110]

7.1 Liability of a Company versus Personal Liability of a Director

Generally, a director cannot be personally held liable for a company's contract because he never enters into the contract for himself, but he enters into it for his principal, the company.[111] Likewise, a director cannot sue on such contract or be sued on them unless he exceeds his authority. In such *ultra vires* circumstances, a director may become liable for breach of warranty.[112] However, it has been established that Directors may become liable for a contract if they contract in their own names.[113] By virtue of section 94 of CAMA 2020, a company would be liable to a third party for the acts of any officer or agent, except where there is collusion between the officer or agent and the said third party. Put differently, section 94 of CAMA 2020 is to the effect that notwithstanding that the officer has acted fraudulently or forged a document purporting to be sealed by or signed on behalf of the company; the company would be liable to a third party for the acts of such an officer except where the company can prove by preponderance of evidence that there was collusion between such officer or agent and the third party.

Notwithstanding the foregoing, it is essential to note that the company is excluded from the civil liability of the Board of Directors (BOD) or Managing Director (MD) where such person had actual knowledge, at the time of the transaction in question, that such BOD or MD had no power to act in the matter it acted, or that the BOD or MD had acted in an irregular manner or if, having regard to his position or relationship with the company, he ought to have known of the absence of such power or of the irregularity.[114] The provision of section 90 of CAMA 2020 is equally relevant here. The section states that acts of any officer or agent of a company shall not be deemed to be acts of the company, unless the company, acting through its members in general meeting, BOD or MD, shall have expressly or impliedly authorised such officer or agent to so act in the matter.[115] By section 276 of CAMA 2020, where a person, not duly appointed as a director, acts as such on the company's behalf, the position of the law is that the act of such a Director will not bind the company and he will be personally liable. However, where he is held out by the company as a director, the company shall be bound by his acts.

[110] Per Niki Tobi, JCA (as he then was).
[111] See *Okeowo v Migliore* (1979) 11 SC 13.
[112] *Smith v Anderson* (1880)15 Ch. D. 247,275 CA; *Firebanks Executors v Humphreys* (1885)13 QBD 54 CA.
[113] *Trenco v African Real Estate Ltd* (1978) 4 SC.
[114] CAMA 2020, s.89 (a).
[115] See https://nlipw.com/part-iii-acts-behalf-company/ accessed 4 June, 2021.

7.2 Civil Liabilities of Directors

It is essential to also consider the civil liabilities of Directors. The general principle under the law of tort, relying on the principle of separate legal personality of a corporation, is that a Director is not personally liable for the tortious acts or omissions of the company.[116] Under the Nigerian Company law, the duties of a director are enshrined in CAMA 2020, to wit, sections 305, 306, 308, and 316, and can conveniently be classified under two broad contexts namely: fiduciary duty and duty of diligence and skill. Directors owe a fiduciary duty of care to the company.[117] In the light of this, section 305 (1) of CAMA 2020 categorically provides that a director stands in a fiduciary relationship towards the company and imposes a duty on him to observe the utmost good faith in any transaction with the company or on its behalf. The imposition of fiduciary duty on directors is meant to prevent abuse of power and conflict of interest on the part of directors in several areas of private governance. Section 308 (1) of CAMA 2020 imposes a duty on every director of a company to exercise the powers and discharge the duties of his office honestly, in good faith, and in the overall best interests of the company. It is further expected that the directors would exercise the degree of care, diligence, and skill which a reasonably prudent director would exercise in such comparable circumstances.[118] It should be noted that section 308 (2) CAMA 2020 makes the failure of a director to take reasonable care in accordance with section 308 (1) of the Act a ground for negligence and breach of duty. However, as aptly noted in *Ramachand v Ekpeyong*,[119] the duties of a director are owed to the company; thus, only the company can sue where a breach has occurred.[120] Of equal importance is section 308(3) CAMA 2020, which unequivocally stipulates that each and every director of a Board, individually and collectively, is liable for actions of the Board in which he participated. The only exception is where such a director can justify his absence at a board meeting where the decision was taken. Obviously, section 308(3) of CAMA 2020 evinces the intention of the lawmakers to make directors individually responsible for the actions of the Board during their "tenure" as a director. This provision applies to all directors of a company, including shadow directors and, in certain circumstances, former directors.

7.3 Liability of Directors to members of the company

In the same token, members of a company may hold the directors liable for their executive actions where such actions are at variance or not in conformity (that is,

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[116] See Pinto and Evans, Corporate Criminal Liability, Sweet & Maxwell, London, Second Edition (2008), p.71; See also *Salomon Salomon & Co. Ltd* [1897] A.C. 22.
[117] CAMA 2020, s.305.
[118] CAMA 2020, s.308 (1).
[119] (1975) 5 S.C. 2
[120] *Ramachand v Ekpeyong* (1975) 5 S.C. 29

ultra vires) with the company's constitution[121] or its objects;[122] or any act or omission affecting the individual rights of a shareholder as a member of the company; committing fraud either on the company[123] or its minority shareholders; and where a meeting of the company cannot be called on time to be of practical use in correcting a wrong done to the company or its minority shareholders;[124] or where the directors are likely to derive a profit or benefit or have profited or benefited from the negligence.[125] In the case of *Adeniji v State*,[126] the Court held that where any business appears to have been recklessly handled or with a fraudulent intention, the Court may, under such circumstance, declare that any person privy to the carrying on of the business in such reckless manner or with intent to defraud, shall be personally liable for all or any of the debts or other liabilities of the company. Section 672(1) of the CAMA 2020 unequivocally provides that if in the course of winding up of a company, the act has been carried on in a reckless manner or with intent to defraud, the company's creditors or creditors of any person for any other purpose, the receiver or liquidator or contributory of the company may… declare that any person who were knowingly parties to the aforesaid be made personally liable.[127] The phrase 'any person' in this context, may include directors if they are parties.

It is also instructive to note the provision of section 271(3) CAMA 2020, which stipulates that a director or member of a company, not being a small company, who knows that a company carries on business after the number of directors has fallen below two for more than sixty days shall be liable for all the company's liabilities and debts during that period when the company so carried on business. The logical inference from this provision is that if the period of carrying on such business is less than sixty days after the directors have fallen below two, there will be no liability. It is, therefore, our view in this paper that sixty days is too long a period before liability can be incurred. Liability should start counting immediately directors discover that the number has fallen below two and they still carry on business. A lot of frauds that can ground the company can take place even under thirty days. The way forward is to comply with the statute regarding the number of directors before any further business can be transacted. Likewise, section 296 (3) of CAMA 2020 provides that where the company's approval is not sought and obtained as required by any such condition, the directors authorising the making of a loan, or the entering into the guarantee, or the provision of the security, shall be jointly and severally liable to indemnify the company against any loss that arises from there. From the foregoing statutory provisions, one can reasonably conclude that situations abound under the

[121] See further Pinto and Evans, Corporate Criminal Liability, Sweet & Maxwell, London, Second Edition (2008), pp. 13-15. The company's constitution refers to the Memorandum and Articles of Association (MEMART) of the Company.
[122] CAMA 2020, s. 300 (a).
[123] CAMA 2020, s. 300(d).
[124] CAMA 2020, s.300 (e).
[125] CAMA 2020, s.300 (f).
[126] *Adeniji v State* (2001) 13 NWLR (Pt.375).
[127] See https://www.legalnaija.com/2017/07/can-director-be-sued-personally-for.html, accessed 4 June 2021.

Nigerian law where directors will be held liable for their acts or omissions in their capacity as a director. Having examined the civil liabilities of a director under Nigerian law, it then becomes pertinent to examine the extent of criminal liability of directors under Nigerian law.

7.4 Criminal Liability of Directors

The Nigerian Legal system[128] accommodates the position at common law to the effect that companies could be criminally liable in some offences. Notwithstanding, however, it appears that the veil of incorporation does not protect a company director (or any company officer such as company secretary and auditors) from criminal liability. Such a director would not ordinarily be criminally liable unless he himself has behaved culpably. Buttressing on this point, Pinto and Evans write:

> In criminal law, there is no parasitic liability of directors, so a director is not guilty of an offence simply because the corporation itself is guilty; a condition precedent to conviction of a director is some act (or omission) on his or her part. Where a director has acted criminally, it is no defence that he did so within the scope of his employment and was committing the crime on behalf of his employer.[129]

Under the Nigerian law, situations abound where a director can be personally held liable for certain offences allegedly committed by a company through one of its organs. CAMA 2020 makes provision for both personal civil liability and criminal liability of directors, while recognising that there are certain instances when the corporate criminal liability will be triggered. For instance, section 416 (1) (b) of CAMA 2020 criminalises false information forwarded by an officer of a company to the company's auditors and provides for the personal liability of each officer.[130] While section 90 of CAMA 2020 recognises the criminal liability and civil liability of company for any acts of its BOD or the MD, in the ordinary course of business, the section also realises that not all acts of an officer or agent (including a director) of a company can be said to be acts of a company.

7.5 Joint Liability for Criminal Actions and lifting the Corporate Veil under Other Statutory Provisions

The company and its directors, in some cases, would be jointly liable for criminal conduct. For example, section 18 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act[131] (Failed Banks Act), provides that where an offence committed by a body corporate under the Act is proved to have been

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[128] The Nigerian Legal system is fashioned along the English Legal system.
[129] Pinto and Evans, Corporate Criminal Liability, Sweet & Maxwell, London, Second Edition (2008), p.73.
[130] CAMA 2020, s.416 (2).
[131] Chapter F2, Vol.6, LFN 2004.

committed with the connivance of, or is attributable to negligence on the part of a company director, both the company and the director shall be held liable. This implies that the Failed Banks Act provides for situations where the veil of incorporation will be lifted to sanction culpable directors. By Section 15 of the Failed Banks Act,[132] directors will be held criminally liable for the issuance of unsecured loans. In *Macebuh v National Deposit Insurance Corporation*,[133] the power to lift the corporate veil was again reiterated as follows: By virtue of section 3 (3) (6) (ii) of the Failed Banks Act, the power to lift (was vested in the tribunal) the Corporate veil of a corporate body indebted to a failed Bank to determine the liability of its members who may be jointly or severally liable for the debts owed by the corporate body to the Failed Bank. It is also instructive to note the wordings of Section 17 of the National Office for Technology Acquisition and Promotion Act (NOTAP).[134] This laudable provision clearly evinces an intention on the part of the lawmakers to make culpable only a director who has knowledge or consent to the crime alleged to have been committed. It may then be rightly asserted that the law does not intend to make culpable a director who was neither seized of the knowledge of the crime as at the time of commission nor consented or connived with the commission of offence.

8.0 Conclusion

Globally, the standard of directors' liability varies from jurisdiction to jurisdiction. It covers the field of the requirements of remedies for oversight failures. As corporate governance principles improve over time, these standards are expected to also improve alongside. In essence, the laws as they are presently would not expect the directors to be passive in the governance of the company, particularly with respect to its financials that forms the bedrock upon which stakeholders deal with it. The director has a duty to undertake a prudent oversight that is not necessarily hinged on what the auditors and management feed him with. There is a fiduciary obligation to raise the bar of investigations. Attorney Irwin Jay Robinson,[135] argues for the protection of corporations, shareholders, creditors, and the society at large from the type of ruin, witnessed in Enron, and Cadbury Nigeria, its Nigerian coin, and other collapsed publicly quoted companies "that a director more than ever before needs to know all that he possibly can about the business and financial operations of the corporation on whose board he serves." He reckons that a director can no longer be a passive participant if he is not going to be accused of "Sleeping behind the wheels". The relevance of a board will be an issue if the company's accounts can be overstated

[132] Cap F2, LFN 2004.
[133] (1997) 2 F.B.T. L. 4.
[134] NOTAP Act Cap N68 LFN 2004. The section provides, inter alia, that "Where an offence under this Act is committed by a body corporate…every director…shall be severally guilty of that offence and liable for the offence in like manner as if he had himself committed the offence, unless he proves that the act or commission constituting the offence took place without his knowledge, consent or connivance."
[135] Justia Legal Services and Lawyers, New York, USA.

or understated, as was the case of Cadbury Nigeria. Conclusively, the position of the law on directors' liability is apparent in most jurisdictions. In Nigeria, various sections of the CAMA 2020 and other related laws provide for situations where directors are liable for their acts by piercing the veil. The reasons why corporate governance was embraced in Nigeria since 2003 are not farfetched, and they are not different from why it came on Board in other jurisdictions. Public companies are established to satisfy various interests of different stakeholders, the chief of which is the investing public. Corporate Governance aims at ensuring that companies are well managed for the investing public to have rewarding returns on their investment. This is why the five sectoral codes of corporate governance have been issued before the issuance of the Nigerian Code of Corporate Governance 2018 by the Financial Reporting Council. These are all we have been able to discuss in this paper. We have also established that the combination of the relevant provisions in CAMA 2020 and Codes of corporate governance regarding directors' liabilities should be further strengthened to ensure that directors discharge their duties towards the company and its numerous stakeholders in a way that will minimise waste and ensure the expected returns. The company's overall interests must be paramount in all decisions and actions of directors so that the corporate goal can be achieved to the benefits of all the stakeholders.

9.0 Recommendations

In the first place, regulatory authorities and relevant bodies must hold the directors accountable as regards compliance with the relevant statutory corporate governance and oversight regulations. This can be likened to "monitoring the monitor." An essential element of Board effectiveness is accountability. Directors should be made accountable for the outcome of every decision they make either individually or collectively as a Board. There should be a more robust board evaluation system to evaluate the performance and continuous relevance of the directors. Directors (of whatever nomenclature) should all be liable to the extent of their omission, commission, or negligence, which makes their companies suffer loss. They should face the consequence(s) of their actions as specified in the Commission's Regulations 2021, and the Regulators should enforce this. There should be gender balance on public boards, and family-tie directors on board should be discarded as much as possible. Directors should ask for reports on remittances from financial officers and ask questions during board meetings. A director should reduce his directorship of public companies to a maximum of five as provided by CAMA 2020, so as to have time to contribute meaningfully to the Boards of the companies where they serve. They should be knowledgeable of the risks they face when assuming their directorial role and performing their directorial duties, especially the industry-specific risks. One such risk is personal liability for certain tax liabilities of the companies they serve. This potential liability arises under the UK CA, Nigerian CAMA 2020, and other relevant laws and statutes, such as the CITA, and the penalties and punishment that attach to such liability should be made extremely harsh. As such, directors should take proactive steps to become aware of the tax risks they face as directors and to adopt practices that will reduce such risks. The US version of compulsory compliance with the Codes of Corporate Governance should be embraced as opposed to the 'comply or explain' version of the UK. This will further make directors to be more cautious in their acts. Directors training and retraining should be part of company's concern. Thorough screening of directors before their appointment is indispensable and should be made mandatory. Those whose personal interests have the potentials to conflict with their duties should never be appointed as directors in the first instance.

In sum, whether a director will be personally liable or whether the company would be made to bear the brunt or both would be made culpable will be based on the facts of each case and the relevant provisions of the applicable law(s). We hereby recommend robust allowances and adequate perquisites of office to motivate directors in discharging their duties selflessly and with all sense of sincerity and purpose. This will discourage them from engaging in activities that can make them incur liability to the detriment of the company. There should be no option of fine but imprisonment for directors who are responsible for the collapse of public companies they serve to act as a deterrent to others. The Commission's Regulations 2021 have many laudable provisions regarding sanctions for erring directors, but these should be complemented by the efforts of Regulatory bodies in the sector concerned. This is because the imposition of a fine alone appears insufficient to deter such practices, as many of the directors can conveniently afford to pay off whatever fine that is imposed. They should equally be banned for life from holding the position of a director of any public company after serving their prison terms. It is only by adopting these stringent measures that good corporate governance could be achieved in our public companies.