DEVOLUTION OF CORPORATE MANAGERIAL POWERS: A CRITICAL ANALYSIS

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Abstract

Generally, corporate managerial powers which, among others, entail powers to manage the company as a going concern, to exercise good faith and to act within powers are devolved to the corporate management. The corporate board may be negatively or positively active in the exercise of its powers. For third parties, the law made adequate protection for third parties which shield them from harm of agency problems. But the same cannot be said of the company. In certain cases where the board is positively active, this may unwittingly result in Longe Effect. Where the company suffers due to managerial slack it is the minority that bears the brunt. The enlightened shareholder value precept, albeit still evolving, can address these risks.

Keywords: Corporate Managerial Power

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1 Introduction

When a company is registered it becomes a legal person distinct from those who from time to time compose it, whether as members or directors or employees. It thereby acquires all the rights of a natural person of contractual capacity.[4] Thus, it can go into contracts, execute documents, borrow money to finance its operations and acquire property.[5] In other words, upon registration[6] the company attains "personhood with the right to form contracts, suffer liability for torts and even make campaign (political) contributions"[7] (Emphasis added). Ascribing personhood to the company reifies the company. This could lead, and has led, to absurd characterisation of the company "as a large insensate beast, blundering about the business landscape and leaving destruction in its wake".[8] With respect, this characterisation, a consequence of reification of the company, is a chasing after the wind, because it apparently lost "sight of the fact that firms do not do things; people do things"[9] and ascribe it to the company. That is, the company can only act through human agents and cannot help itself.

To enable the company function as a person, the modern company is a structure made up of three principal organs. These are the shareholders in general meeting[10], the board of directors and the executive management headed by the chief executive officer (CEO).[11] These are the *alter ego* of the company whose acts are treated as the acts of the company so that the company can be criminally and civilly liable thereto. As between the organs, the law devolved the powers of the company. Thus, to the shareholders (acting as members in general meeting) are donated residual powers of the company. The nature of the powers of shareholders is interventionist and remedial. It is interventionist because it operates only when the organ vested with managerial control is by any reason incapacitated and unable to act. It is remedial because it can be activated when there is clear or apparent abuse of managerial powers of the company. That is why the residual powers available to members in general

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[4] See section 38 Nigerian Companies and Allied Matters Act Laws of the Federation of Nigeria CAP C20 2004 (hereafter, CAMA 2004) and Salomon v Salomon (1897) AC 22 CA

[5] Macaura v Northern Assurance Co (1925) AC 619 HL; Gramophone and Typewriter Co Ltd v Stanley (1908) 2 KB 89 CA

[6] See sections 38 and 71 CAMA 2004; sections 16(3), 39 and 43 English Companies Act 2006 (hereafter CA 2006).

[7] Hayden, G.M. and Bodie, M.T., (2011), "The Uncorporation and the Unraveling of 'Nexus of Contracts' Theory", Michagan Law Review, Vol 109, p. 1127 (available at http://repository.law.umich.edu/mlr/vol109/iss6/16, accessed 19/09/2015. In Nigeria, the law in the book (which is observed more in breach) strictly prohibits political donations (section 38(2) CAMA 2004); compare this with the preferred English jurisdiction which makes political donations subject to the resolution of the company authorising such political donation or expenditure (section 366 CA 2006).

[8] Hayden and Bodie, ibid, p. 1128

[9] O'Kelley, C.R.T., "Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate", n. 11, p. 4 available at http://ssrn.com/abstract=2017237. Accessed 19/9/2015

[10] The focus of this Paper is on the corporate board and executive management (collectively identified as 'corporate management').

[11] See section 63(1) CAMA 2004

meeting are exercisable in restricted cases. Those restricted cases include where the directors are disqualified[12], or where the board is deadlocked so that its meetings are inquorate[13], making it impracticable for the conduct of the company's business[14]. Equally, the members will be entitled to exercise managerial powers of the company where the members in general meeting by the instrument of ordinary resolution dismisses the entire board[15]. In Nigeria, for example, a director will be disqualified where he fails to meet the requirement of share qualification after the lapse of two months from the date of his appointment[16] or where he is convicted of an offence involving fraud[17]. In the UK, the court may make a disqualification order against a director where it appears to it that he has been persistently in default in relation to any requirement as to return, account or other document to be filed with, delivered or sent, or notice of any matter to be given, to the registrar of companies[18]. Thus, the courts attach particular importance "to failure by directors to file annual returns, produce audited accounts and to keep proper accounting records"[19]. Infractions such as these may constitute "ingredients in a finding of unfitness"[20] for disqualification of a director[21].

On the other hand, to the corporate board are donated managerial powers of the company.[22] This has been interpreted to mean that "the directors either manage the company themselves or, as in larger corporations, monitor employee executives" of which the CEO is the foremost among such employee executives.[23] That is, the Board would normally delegate its powers to the executive management, headed by the managing director or CEO, who will oversee the day to day affairs and activities of the company. Accordingly, the board of directors may from time to time *appoint one or more of their body to the office of the managing director* and may delegate all or any of their powers to such managing director[24] (Italics mine). In what strikes at the foundation of executive management as an organ of the company, the Nigerian Supreme Court had held that there was no provision for appointment of executive director under the law. Taking all relevant circumstances does this holding line up with intendment of the law?[25]

From the foregoing, there is no doubt that too much power is concentrated in the corporate management of the Company[26]. Considering that world class companies continue to totter and subsequently implode despite having a sound system of corporate governance[27], it becomes necessary to any analyse the connection between the wide powers of management and managerial slack. That is, to what extent do the wide powers feed or discourage managerial slack? Managerial slack is defined as lapses in managerial competence or effort, managerial entrenchment or empire building, and excessive managerial compensation consumption.[28] In undertaking this task, this Paper is divided into four parts – part I considers the managerial powers of the company; part II looks at the safeguards for securing effective exercise of corporate powers; part III considers legal remedies for abuse of corporate managerial powers. In conclusion (Part IV) the view is taken that corporate managers with enormous powers to their kitty have little motivation to pursue and promote the best interests of the company.

2 Managerial powers of the company

This is exercised by the corporate board and, at its pleasure, the executive management. The Board is a creation of the law. But the executive management can rightly be said to be a creation of the board that appoint them to, and superintend them as they, manage the day to day activities of the company. Nigeria, like the UK, operates unitary board structure. This is unlike the German jurisdiction that runs on two-tier board structure, "consisting of a managerial or executive board and a supervisory board which plays an important role in ensuring work-

[12] See Alexander Ward & Co Ltd v Samyang Navigation Co Ltd (1975) 1 WLR 673
[13] Isle of wight Rly Co v Tahourdin (1883) 25 ChD 320; see also, section 265 CAMA 2004
[14] Foster v Foster (1916) 1 Ch 532; Barron v Potter (1914) 1 Ch 895
[15] See sections 258 and 262(1) CAMA 2004
[16] Section 251(3) CAMA 2004
[17] Section 254 CAMA 2004. Also see section 257 CAMA 2004 for other statutorily prescribed disqualifying factors.
[18] See section 3, Company Directors Disqualification Act, 1986 (hereafter CDDA 1986)
[19] Davies, P.L., Gower & Davies' Principles of Modern Company Law, 7th edition (London: Sweet & Maxwell, 2003), p.220
[20] Davies, ibid, n. 58, p. 220
[21] See section 6, CDDA 1986
[22] Section 63(3) and (4) CAMA; section 40(1) CA 20062004; section 141 Delaware General Corporations Law (hereafter DGCL)
[23] Cahn, A. and Donald, D.C., Comparative Company Law (Cambridge: CUP, 2010) p. 305
[24] See section 64(b) CAMA 2004
[25] See below "(b) on executive directors"
[26] It is important to note that the devolution of powers between members in general meeting and corporate management is of concern in public companies, where ownership is separate from control.
[27] It is outside the scope of this paper to attempt an analysis of corporate governance as a mechanism for checking abuse of corporate managerial powers. This can sufficiently form the subject of another paper.
[28] Traintis, G.G. and Daniels, R.J., (1995), "The Role of Debt in Interactive Corporate Governance" California Law Review Vol. 83 p. 1073. Available online at http://repository.upenn.edu/law_series/12 (Accessed 15/04/2014)

participation, or *'co-determination'* in German companies"[29] (Emphasis added). The exercise of corporate managerial powers involves four-step broad decision making process steps:

> 1. *initiation* – generation of proposals for resource utilization and structure of contracts; 2. *ratification* – choice of decision initiatives to be implemented; 3. *implementation* – execution of ratified decision; and 4. *monitoring* – measurement of the performance of decision agents and implementation of rewards.[30]

Initiation and implementation constitute "**decision management**" and are allocated to the same agents (in this case, the executive management); while ratification and monitoring which constitute "**decision control**" are undertaken by board of directors. In other words, the board of directors are responsible for ratifying decisions and monitoring the outcome of such decisions as initiated and implemented by executive management. This should be the case in modern open (public) companies where "the decision managers who initiate and implement important decisions are not the major residual claimants and therefore do not bear a major share of the wealth effects of their decisions"[31]. Where decision management and control is located in the same organ, residual claimants will have little protection, if any, against opportunism or misbehaviour of decision managers. It is outside the scope of this paper to examine in detail the activities involved in each process. For instance, to initiate a decision, the management will have to consider the past, the present and the future.[32] It is now sought to examine how the two-arm corporate management discharge its statutorily assigned managerial roles.

2.1 The Corporate Board (Board of Directors)

A director includes any person occupying the position of a director, by whatever name called, and includes a 'shadow director' being a person in accordance with whose directions or instructions the directors of the company are accustomed to act.[33] Directors are the persons to whom management of a company is entrusted[34], and represent the highest level of management.[35] Collectively the directors are referred to as a board. To achieve the decision control roles of the board, the directors would have to "comprise of diverse group of experienced and talented individuals, all of whom would practice the characteristics and values of good commercial senses, courage, openness and integrity"[36].

Subject to the articles or statutory provision, the board have a duty to manage the business in the interest of the company and thus generates the drive on which the growth of individual companies and indeed of the economy as a whole depends. Since corporate strategy, vision and direction constitute the directors' core responsibilities to the company, the board points to the future of the company[37]. Hence, the primary role of the board is to exercise their powers in the interest of the company.[38] It does this by properly articulating the goals, and by deploying the assets, of the company to achieve the goals. The goals constitute the basis on which "major plans and policies having corporation-wide significance are approved by the board".[39] For example, annual budgets of companies are subject to board approval (ratification) before they can be implemented by the executive management. To complete the decision control cycle, boards must continuously review (monitor) "operating results, executive performance, market and conditions, and the extent to which corporate objectives, and policies are succeeding."[40] Without effective delivery of the decision control function, it is doubtful how the board can "provide entrepreneurial leadership of the company within a framework of prudent and effective controls which enable risk to be assessed and managed"[41] (Emphasis added).

How does the board deliver on its mandate as the shareholders' representative? The board may be negatively or positively active in this regard. Where the board is negatively active, it could be that there is unholy alliance between the board and executive to pillage and strip the company. Or it could occur through CEO board capture. Or it may be a function of groupthink syndrome. Or it could result from insufficient technical knowledge (incompetence) on the part of the board members. Where the board is negatively active, the arm's length model of boards and their critical watchdog role becomes compromised. And "short of firing the CEO, open dissent is

[29] Sealy, L. and Worthington, S., Sealy's Cases and Materials in Company Law, Ninth edition (Oxford: OUP, 2010) p. 179
[30] Fama, E.F., (1980),"Agency Problems and the Theory of the Firm". The Journal of Political Economy, Vol 88, No 2, p. 303
[31] Fama, ibid, p. 304
[32] McFarland, D.E., Management: Principles and Practices, fourth edition (New York: Macmillan, 1964) p. 262
[33] Section 567 CAMA 2004; sections 250 and 251 CA 2006
[34] Abott, K., Pendlebury, N., and Wardman, K., Business Law seventh edition (London: Continuum, 2002) p. 425
[35] Bittel, L.R. & Ramsey, J.E., Encyclopaedia of Professional Management, 2nd edition, Vol 1 (Connecticut: Grolier, 1995) p. 65
[36] Smerdon, R., A Practical Guide to Corporate Governance, 3rd edition (London: Sweet & Maxwell, 2007) p. 50.
[37] Jones, J.H., *Building Better Boards,* DTI, December 2004
[38] Company here representing the body of members as against its assets, capital, and business
[39] Bittel and Ramsey, op cit, p. 66
[40] Bittel and Ramsey, ibid, p. 66
[41] Morris, G.D., McKay S., and Oates, A., Finance Director's Handbook, fourth edition (Oxford: CIMA Publishing, 2007) p. 215

rarely found in board meetings".[42] With this state of affairs, the atmosphere at board meetings will be characteristically one of "courtesy, politeness and deference at the expense of truth and frankness..., reflecting a general reluctance of confronting a CEO regarding management decisions, which is seen as both a symptom and cause of failure in the control system".[43] Instead of acting as a bulwark against managerial opportunism, the board will gleefully turn a blind eye to clear cases of executive shirking.

Therefore, where the CEO succeeds in capturing the board, independence becomes compromised as collusion becomes business unusual as usual. Hence a board can be formally independent but functionally compromised. That is, one can be independent on paper but heavily compromised in reality. There are implications to this. Firstly, the parameters for fixing formal independence cannot be relied on[44]. Secondly, those parameters cannot promote functional independence. For instance, if a person adjudged to be independent solicits and accepts consulting or any other fee-paying engagement from the executive apart from his earnings as an independent director, his independence can be easily compromised.[45] Thirdly, board independence may not efficiently prevent managerial slack[46].

Moreover, groupthink tendencies may also negatively impact on the role of the board because it makes "recourse to outside opinion less likely and would also be a barrier to creating a healthy degree of heterogeneity of opinions within the group"[47] (Emphasis added). Hence, collusion makes it possible for directors to be drenched in insider dealings[48]; board capture gives the CEO 'right' to call the shorts as he 'buys' the conscience of even the independents on the board[49] and groupthink festers bandwagon and incompetence institutionalises shirking and makes it difficult for the board protect the interest of their appointors (shareholders) against the agency problems of the executive.[50] Most of these factors accounted for the fall of Enron, which informed the damning verdict that:

> Enron's directors either did not know what was going on and should have, or the board knew and failed to stop it. The former would suggest that the board members were incompetent, the latter would implicate the board as an accessory to fraud. (...) Without a doubt, the directors failed to carry out their responsibilities to Enron's shareholders, employers, customers, and the wider community.[51]

On the other hand, the board may be positively active. Here it means that the board has no reason to covet the good graces of management and will not hesitate to punish and remedy any case of misbehaviour[52]. It means that the board will have relevant information which it needs to be able to make a meaningful impact in the governance of companies, albeit chances exist that management may not be forthcoming with all the information or may be selective in giving out information. However, the board may be overly and unduly active in its bid to

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[42] Marnet, O., Behaviour and Rationality in Corporate Governance (Oxford: Routledge, 2008) p. 134

[43] Jensen, M.C., (1993), "The Modern Industrial Revolution, Exit and the Failure of Internal Control Systems" Journal of Finance Vol 48 No 3, p. 863. Cited in Marnet, O., ibid, p. 132

[44] Examples of such parameters include connection with the company (by employment or blood), relationship with the company (as an adviser, supplier, etc), length of service on the board, etc. See Code Provision A.3.1, the UK Combined Code on Corporate Governance, 2008 and Part B Para 5.5, SEC Code of Corporate Governance for Public Companies in Nigeria.

[45] On this compare the definition of independence under Code Provision A.3.1 the UK Combined Code on Corporate Governance and Section 301 of the US Sarbenes-Oxley Act 2002.

[46] For example, Ribestein L.E., "Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbenes-Oxley Act of 2002" wrote that "no corporate boards could be much more independent than those of Amtrak, which have managed that company into failure and government dependence. Enron had a fully functional audit committees operating under the SEC's expanded rules on audit committees" yet it imploded under the deadweight of managerial misbehaviour. Cited in: Clarke, D.C., (2002), "Three Concepts of the Independent Director" Delaware Journal Corporate Law, Vol 32, p. 75

[47] Marnet, op cit, p. 135

[48] Daniels v Daniels (1978) Ch 406; In Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) (1981) Ch 257 at page 315 Vincelott J said that "to put up with foolish directors is one thing; to put with directors who are foolish that they make a profit of £115,000 odd at the expense of the company is quite another".

[49] This writer had attended board meeting where the members are 'yes men'. Expectedly, there has never been any recorded case where the board queried the report of the chief executive officer. In a robotic manner all prayers were quickly granted as though members of the board were part and parcel the management and therefore were seized with background details to the transaction. In fact the directors were always seeking favours from the chief executive. There were cases where the chairman of the board would insist on maintaining a schedule of board meetings and, rightly, insist of religious observance of that schedule. However, at board meetings proper it was a different ball game as report, proposals, etc would get swift passage. One instance where explanation was demanded was when the CEO required injection of further capital by way of increase in the capital of the company. Knowing that the buck must stop at their respective tables (as director shareholders on the board), the CEO was asked to justify the need, not necessarily the sense, for increase in the capital of the company.

[50] In the UK one can be disqualified from directorship under the CDDA for failing to exercise appropriate degree of competence: Re Continental Assurance Company of London plc (in Liquidation) (No 1) (1997) 1 BCLC 48

[51] Marnet, ibid, p. 135

[52] Re Barings plc and Ors (No. 5) (1999) 1 BCLC 433; Longe v FBN Ltd (2006) 3 NWLR (Pt 967) 228 CA; (2010) 2-3 SC (Pt 62) SC

cure executive infraction. In Nigeria this could result in **Longe Effect**[53] in board function.[54] This is a case where the board justifiably insistent and determined on addressing and arresting managerial misbehaviour causes the company to suffer avoidable losses because of failure to comply with a statutory provision. In the case the CEO failed to exercise diligence in granting a facility to a customer which became bad. He was suspended and subsequently removed from office. The Court held that no matter how impugnable the action of the officer, bodies governed by Statute cannot be allowed to circumvent the applicability of a statutory provision[55] *by first suspending a director without notice before removing him again without notice*. The Court observed that the bank breached the law in its bid to punish managerial slack and thereby "brought about this unfortunate situation on itself... as what could have been done validly within three months has been made to last eight years" and at a high cost to the bank.

How can boards of Nigerian companies avoid the **Longe Effect** in their desire to curtail agency problems of executive management? Since provisions for entrenchment is not available in Nigeria[56], one of the ways to avoid the **Longe Effect** and still achieve justice for the company is to vest the power of removal in the chairman of the board. Thus, subject to ratification by the board, the chairman could be given the power to revoke the appointment of any executive director[57], who is shown to have fallen short on rules and standards. This suggestion is fortified by the statutory provision that "where the memorandum or articles empower any person to appoint or remove any director or other officer of the company, such power shall be enforceable by that person notwithstanding that he is not a member or an officer of the company".[58] However, the company's articles must specifically empower the chairman; else any authorisation of the chairman by the board will be of no effect. This condition should form one of the contractual terms in the contract between the executive officer and the company.

At this juncture it is important to enquire, why should the law donate enormous powers to the board of directors? There are three grounds for this. The first is the fact that in a public company where the members are diffuse and disparate, it is not feasible for all the stock owners to be involved in the details of management. In any case, having money to invest does not equate having technical expertise to manage the investment. The era of classical entrepreneurial view of the company is gone. Thus, following industrialisation and advancements in science and technology the diversity and technical intricacy of industry means a much greater reliance on expert managers rather than the merely wealthy entrepreneurs, so that professionals were appointed to corporate management cadre.

The second reason is that the board is conceived and set up as a disinterested organ which can impartially moderate the tensions between minority and majority shareholders[59] and between shareholders as a whole and executive management with other stakeholders.[60] That is, the board is seen as the only body that can effectively deal with the basic agency problem between the firm's owners and its managers[61], and also act as:

> useful instrument for dealing with the two other basic agency problems that face a business corporation: the prospect that the majority or controlling shareholders will behave opportunistically toward non-controlling (minority) shareholders, and the prospect that the firm or its owners will act opportunistically toward other parties with whom it transacts, such as creditors and employees.[62]

[53] Coined after the judgment of the Nigerian Supreme Court in Longe v. FBN plc (supra) which invalidated the board meeting at which the appellant managing director was dismissed for committing acts of impropriety. The decision of the Supreme Court meant that the respondent will have to pay the appellant his emoluments from June 2002 to March 2010, since by the decision he was only and still on suspension with pay!

[54] The Longe Effect might not be applicable in other jurisdictions.

[55] In this case section 266(3) CAMA 2004 which invalidates any meeting of which there was failure to give notice.

[56] See section 22 CA 2006

[57] Since the appointment of non-executive directors can only be determined in line with section 262 CAMA.

[58] Section 41(3) CAMA 2004

[59] Companies are run on the principle of majority rule, and directors are elected/appointed by resolution of shareholders. It is doubtful if the board will ever be in a position where it can act impartially as between the contending interests of the majority and minority.

[60] Davies, P.L., "The Board of Directors: Composition, Structure, Duties and Powers". Company Law Reform in OECD Countries: A Comparative Outlook of Current Trends, Stockholm, Sweden, 7-8 Dec 2000. Available online at http://www.oecd.org/dat/ca/corporate governanceprinciples/1857291.pdf (Accessed 12/09/2015)

[61] Clarke, op cit, p. 84

[62] Hansmann H., and Kraakman R., "The Basic Governance Structure". Available at http://law.yale.edu/documents/pdf /CBL_Symposium 10_05/53-4%2520BusinessGovernance Structure_Hansmann_Kraakman.pdf (Accessed 12/09/2015); also see Desender, K.A., "The Relationship between the ownership structure and the role of the board". Available at http://bsuiness.illinois.edu/working-papers/papers/09-015.pdf (Accessed 12/9/2015)

From discussions thus far it is hard to state categorically that the board has been efficient in mediating between the majority and minority shareholders and between the executive management and other parties that come to deal with the company.

The third ground for vesting enormous power in the corporate management is based on the trust proposition founded on stewardship model[63]. This basis holds that man is trustworthy, able to act in good faith in the interest of others with integrity and honesty[64]. Thus, company law is only reinforcing the trust proposition to the effect that men (such as the board of directors) in responsible positions must be trusted until there is reason to distrust them[65]. On this Lord Halsbury LC reminded us that "the business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management"[66]. However, the risen focus of regulators in governance of firms means that the reason to distrust has become the rule than the exception.[67]

2.2 The Executive Management (headed by the CEO)

The executive management is in charge of decision management in the company. The role and position of executive management is only of interest in public companies where the members are large dispersed and disparate because in a private company "where the manager is also the firm's sole security holder[68]... there is clearly no incentive problem"[69]. Bratton identifies three essential aspects of executive management's power:

> First, management groups determine the processes of production and distribution. Second, management groups dominate enormous hierarchical bureaucracies and exercise authority over all of those lower in the hierarchy. Third, management-dominated corporate entities impose externalities on those outside the entities.[70]

No doubt, delegating decision management function to the executive management is a wise one because separation and diffusion of decision management and decision control limits the power of individual decision agents to expropriate the interests of residual claimants. It also allows valuable knowledge and expertise to be unleashed on the governance of the company, enabling the company to function more effectively through efficient organisation of subordinated factors of production.[71]

But there are costs of managerial control. Thus, being the managers rather of other people's resources than of their own, they "cannot well be expected that they should watch over it with the same anxious vigilance with which the partners of a private copartnery frequently watch over their own."[72] Possessing expertise in organizing resources puts the managers in a position of enormous power with wide discretion. This increases the temptation to feed on innate human greed and it has been observed that the avenues through which to express greed continue to expand enormously.[73] Thus instead of conducting the business with the view to promoting the interest of the company, the managers preoccupy themselves with pursuing self-interest goals and implementing self-perpetuating oligarchic goals. Secondly, it has been charged, as a cost of managerialism, that management exercises enormous power without commensurate accountability. Insisting on this, Bratton argues that:

> First, legal doctrine vests governing power of the corporate entity in the board of directors subject to shareholder vote. Second, management in fact controls the board. Third, the financial community supports management. Therefore, management

[63] See generally, Muth M. and Donaldson L., (1998), "Stewardship Theory and Board Structure – A Contingency Approach", Corporate Governance, Blackwells, vol. 6, No. 1, pp. 5-28.
[64] Chambers, A., Corporate Governance Handbook, fourth edition (London: Tottel Publishing, 2008), p. 200.
[65] The Court affirmed this in Re Continental Assurance Company of London Plc (2001) BPIR 733. Once the reason to distrust them arises, as when they exceed their powers or act mala fide and without regard to due diligence, the members can exercise and assert their residual powers.
[66] Dovey v Cory (1901) AC 477
[67] The Financial Reporting Council of Nigeria is now actively setting and pursuing the agenda of corporate governance standards for public interest entities in Nigeria. In the UK, the Financial Reporting Council issued the Combined Code on Governance in 2008.
[68] In private companies they operate more like quasi partnerships or, in the case of single member company which is possible in the UK (but not in Nigeria), like sole proprietorship.
[69] Fama, op cit, pp. 295-296
[70] Bratton, W.W., (1989), "The "Nexus of Contracts" Corporation: A Critical Appraisal" Cornell Law Review, Vol 74, p. 413. Available at http://scholarship.law.upenn.edu/faculty_scholarship/839 (Accessed 20/8/2015
[71] Fama E.F., and Jensen, M.C., (1983) "Separation of Ownership and Control" Journal of Law and Economics, Vol 26, No 2, p. 309. Available at http://www.jstor.org/stable/725104 (Accessed 23/9/2015); Bratton, ibid, p. 414
[72] Smith, A., Wealth of Nations (Hertfordshire: Wordsworth, 2012) p. 741
[73] Chambers, A., Corporate Governance Handbook, Fourth edition (West Sussex: Tottel Publishing, 2008) p. 232

> groups are unaccountable to higher authority (whether the shareholders or the board) (Emphasis added)[74]

Ordinarily, hierarchical partitioning of corporate decision making process should act as disincentive to engage in actions that benefit the decision agents and hurt the residual claimants. But this is not always the outcome. For instance when the CEO succeeds in capturing the board, control of the company is automatically transferred to the managers. This avails the CEO with enormous powers to engage in activities which may be detrimental to other stakeholders. In Nigeria this was the experience of the now defunct, Intercontinental Bank plc, whose former CEO was also the Vice Chairman of the Board. He amassed so much power and influence that it did not come as a surprise when the bank imploded during the 2009 banking crises in Nigeria.[75] Also, in another case, the CEO of a bank was so powerful that she unilaterally approved and disbursed a loan application which the board of directors at duly constituted meetings had declined on several occasions.[76]

The head of the executive management is the managing director (CEO)[77], to whom the board may delegate all or any of its powers.[78] She is supported by executive directors. In Nigeria, the executive director is "an employee of the company whose status has been raised to that of a director but who continues essentially as such employee"[79]. Her employment is normally contractual, the terms of which may be fixed by the articles and complemented by a separate service or employment contract.[80] An executive director is a member of the board and can exercise corporate managerial power[81] as far the day to day running of the business is concerned. The Nigerian Supreme Court had held that there is no provision for the appointment of executive directors under the Nigerian company law[82]. With great respect and considering the surrounding circumstances, this view deserves further analysis.

Thus attention must be drawn to section 64(b) CAMA 2004 which provides that the board of directors may from time to time appoint one *"or more of their body"* to the office of managing director and may delegate all or any of their powers to such managing director (Italics mine). Now by the use of the phrase *"or more of their body"*, can it be inferred that the board of directors may appoint several directors to the office of the managing director, so that we can have two, three or more managing directors in a company? That will be preposterous. The Nigerian law drew heavily from the English Companies Act 1985. For instance there is a simile provision in TABLE A to the Companies Act 1985 which states that:

> The directors may appoint one or more of their number to the office of managing director or to any other executive office under the company and may enter into an agreement or arrangement with any director for his employment by the company or for the provision by him of any services outside the scope of the ordinary duties of a director. Any such appointment, agreement or arrangement may be made upon such terms as the directors determine and they may remunerate any such director for his services as they think fit. Any appointment of a director to an executive office shall terminate if he ceases to be a director but without prejudice to any claim to damages for breach of the contract of service between the director and the company. A managing director and a director holding any other executive office shall not be subject to retirement by rotation.[83]

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[74] Bratton, op cit, p. 413

[75] In 2011 a UK High Court convicted the CEO/Vice Chairman, Mr Erastus Akingbola, and he was made to forfeit over £70 million to the bank. In Nigeria, he is still facing charges over allegation that he stole not less than N45 billion of the bank's money. No doubt his activities, aided by successful capture of board members, contributed in running the bank aground. For example see, "N47.6Bn Theft: EFCC Re-Arraigns Erastus Akingbola". Media & Publicity, EFCC (24/3/2014). Available http://efccnigeria.org/index.php/news/349-n47-6bn-theft-efcc-re-arraigns-erastus-akingbola. Accessed 12/10/2014; and also see "UK High Court Orders, Erastus Akingbola, to Surrender £68 million to IB Plc", Nairaland Forum (4/4/2011) Available at http://nairaland.com/638718/uk-high-court-orders-erastus. Accessed 12/10/2014

[76] Onamson, F.O., (2009), "Legal Implications of Banking Sector Reform", Law and Economy, The Nation Newspapers, Vol 4, Nos. 1159 (22 Sep), 1166 (29 Sep) and 1173 (1 Oct)

[77] In the US the Delaware courts have held that the office of president is the chief executive officer of the company and has all powers necessary for its ordinary operations: Joseph Greenspan's Sons Iron & Steel CO. v Pecos Valley Gas Co., 156 A 350 (1931); Italo-Petroleum Corp of America v Hannigan, 14 A 2d 401 (1940): cited in Cahn and Donald, op cit, p. 316

[78] See section 64(b) CAMA 2004. Under Common Law the right to appoint a managing director must be conferred by the articles. Otherwise, it is incompetent for the directors to make such an appointment, per Swinfen Eady LJ in Nelson v James Nelson & Sons Ltd (1914) 2 KB 770

[79] Orojo, op cit, p. 248

[80] See Iwuchukwu v Nwizu (1994) 7 NWLR (Pt 357) 379; Yalaju-Amaye v AREC Ltd (supra); Longe v FBN Plc (supra)

[81] See Olufosoye v Fakorede (1993) 1 NWLR (Pt 272) 747..

[82] See Longe v. FBN plc (supra), where at page 105 the SC stated that there is no provision in the CAMA 2004 for appointment of executive directors and that the statutory definition of directors does not recognise the nomenclature as between executive and non-executive directors, per Oguntade, JSC.

[83] Art 84 Table A S.I. 1985/805

This means that the phrase *or more of their body* was intended to be qualified by the phrase "*or to any other executive office*" (Italics mine). In this sense, the phrase in the law is superfluous. Or could it be the printer's devil? If the Nigerian law was explicitly rendered as its English counterpart above, it is submitted that the position of the Nigerian Supreme Court in Longe's case (supra) would have been different. Further, the non-provision for the appointment of executive directors under Nigerian law could not have been intended by the legislature. Two instances lend credence to this point.

One, the law in defining a director provided that third parties dealing with the company are entitled to presume that all persons who are described by the company as directors, *whether as executive or otherwise*, have been duly appointed[84] (Italics mine). Two, the law specifically provided that equal standard of care attach to both executive and non-executive directors, and qualifying same with the proviso that additional liability and benefit may arise under the master and servant law in the case of an executive director if there is an express or implied contract to that effect.[85] Express contract as contained in a separate contract of employment or the articles by virtue of his employment as an employee of the company. Implied by virtue of master and servant relationship, terms are implied into the contract of employment as a matter of custom, common or statute law. For instance, there is implied in the contract of employment of every employee a term that he will not disclose the trade secrets and confidential information of his employer, so that an executive director is caught by this liability[86]. This implied term continues after the cessation of employment[87]. Also, custom or practice, if shown to be notorious and its existence known to the executive director, may be implied into a contract of employment[88]. The implication of all these is that except the courts become purposive in construing the relevant section of the law, there is need for further legislative work to reflect the true legislative intent.

2.3 The Extent of Corporate Management Powers

The principle of devolution of power in the corporation is aimed at achieving a separation of ownership from control, so that the directors acting within their powers can, and do, take decisions against the wishes of the members[89]. Despite this fact, it should be noted that members have residual managerial powers and are to that extent to interfere[90] in the management of companies. In the exercise of their managerial powers, it has been emphasized that directors who are careful to take decisions which in their honest view is for the benefit of the company are not to be restrained because a majority shareholder or shareholders do not want the directors to so act.[91] What, then, does the managerial powers donated to board entail?

(i) *It entails managing the company as a going concern*[92]. This means that the company must be operating successfully, with a likelihood of continuing to remain so successful in the long term. Also, to manage it as a going concern does not entail a power to give bribes in order to secure business for the company[93]. Obviously too, it does not entail power to accept bribes, gifts or commission either in cash or kind from any person or to share in the profit of that person in respect of any transaction involving the company[94]. Shockingly, it has been found that Nigerian banks engage in profuse corruption because it is positively correlated to profitability[95]. What an awkwardly anomalous situation! Still on the going concern basis, corporate management lacks the standing or power to petition for winding up[96]. This is because allowing them to do so would destroy the basis of their managerial power.

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[84] Section 244(2) CAMA 2004
[85] Section 282(4) CAMA 2004
[86] See Bents Brewery v Hogan (1945) 2 All ER 570. But see generally Uvieghara, E.E., Labour Law in Nigeria (Lagos: Malthouse Law Books, 2001) pp.12-43; Lewis, D. and Sargeant, M., Essentials of Employment Law, 7th Edition (London: CIPD, 2002) p. 24
[87] See Facenda Chicken Ltd v Fowler (1985) 1 All ER 724
[88] See Foxall v The International Land Credit Company (1867) 16 LT 637. But see generally Uvieghara, E.E., op cit, pp.12-43; Lewis, D. and Sargeant, M., op cit, p. 24
[89] Howard Smith Ltd v Ampol Petroleum Ltd (1974) AC 821
[90] Grundt v Great Boulder Proprietary Mines Ltd (1948) Ch 145)
[91] Per Barwick, CJ in Ashburton Oil NL v Alpha Minerals NL (1971) 123 CLR 614
[92] Re The Standard Bank of Australia Ltd (1898) 24 VLR 304; Re Galway & Salthill Tramways Co (1918) 1 IR 62
[93] See sections 8 and 9 Corrupt Practices and Other Related Offences Act, CAP C31 LFN 2004, that punishes the receiver and giver of bribes; and section 58(4)(a)-(h) Public Procurement Act, No. 14, 2007, that provides offences related to unconscionable conduct of businessmen. See also, E. Hannibal & Co Ltd v Frost (1987) 4 BCC 3.
[94] Section 287 CAMA 2004; section 176 CA 2006
[95] An empirical study of over 48 banks in Nigeria from 1996-2006 reveals that corruption has a significant positive impact on bank profitability in Nigeria: Toni Aburime, "Impact of Corruption on Bank Profitability in Nigeria". Available online at http://kgk.bmf.hu/system/files/Aburime Toni.pdf, cited in Sukubo, J., "Legal Reform and Corruption of Financial Institutions in Nigeria" (unpublished) LLM Dissertation, Institute of Advanced Legal Studies, University of London, 2009-2010, p. 74. Available at http://sas-space.sas.ac.uk/2761/1/Sukubo LLM ICGFREL Dissertation.pdf (Accessed 28/09/2014)
[96] Re Emmadart Ltd (1979) Ch 540; see also sections 408(a), 410(1)(a) and 457 CAMA 2004 that vest the power in the members. In the UK, the directors have power to appoint an administrator, see Schedule B1, para. 22, Insolvency Act 1986

(ii) *It entails exercise of power subject to the Articles*. This means that members can reserve the right to veto certain matters. In Salmon v Quin & Axtens Ltd (supra) the articles of the company conferred a general power of management on the directors; while Article 80 made director's decisions on certain matters subject to the veto of either of two named shareholders. These two named shareholders were also appointed directors and managing directors of the company by the articles. One of the named shareholders exercised the veto. The court held that an ordinary resolution of the members was ineffective to override the veto because it was an attempt to alter Article 80 by ordinary resolution instead of special resolution. Of course it is a fact that where the directors exercised their powers ultra vires the articles, the company will still be bound, except members are able to restrain them by action from doing so.[97]

(iii) It entails exercise of power in good faith and with due diligence. The directors are at all times under duty to exercise their power in good faith in the interest of the company as a whole. This duty includes the duty to disclose any wrongdoing by the director.[98] The good faith requirement underpins all directors' duties, including the exercise of power by corporate management. Accordingly in line with the good faith duty, the directors must exercise their power for the right purpose and not for a collateral purpose. The power must be exercised prudently; otherwise it will constitute a breach of duty.

(iv) It entails power to litigate. The power to litigate in the name of the company is within the province of the general powers of corporate management. It would appear that corporate management cannot be overruled when a decision is taken to litigate[99], except under derivative suit.[100] Under permitted cases, this power is however revertible to the members, for example where the directors refuse or neglect to exercise the power[101] and a member sues derivatively.

3 Safeguards for securing effective exercise of managerial powers

Corporate managerial powers lie with the board which can cascade it to the executive management (headed by the managing director and other executive directors). The board retains decision control function while it donates decision management function to the executive. How the law secured unfettered exercise of the powers is the focus of this section. Hence this section will consider protection of third parties and protection of the company.

3.1 Protection of Third Parties

Generally, directors are bound to act within powers and may not act for any collateral purpose. This means that adverse exercise of power will amount to breach of duty and may expose the director to personal liability.[102] As between the company and third parties, what is the effect of directors (a) exercising the authority of the company where there is none to exercise or (b) exceeding the authority given to them under the law or by the articles?

(i) Total absence of authority

Previously, where a company lacks power to enter into any transaction, or where the directors are expressly prohibited from entering into any transaction (e.g., prohibition from borrowing), the company and the directors would be bound by the prohibition. Accordingly:

> There can be no doubt that where there is an express prohibition against borrowing, it must be obeyed. There is also no doubt, that where there is not an express prohibition against borrowing in a case of a company, or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper business.[103]

(hereafter IA 1986); and power to petition for winding up by the court: see sections 122 and 124, IA 1986. The petition must, however, be presented by ALL the directors of the company: Re Instrumentation Electrical Services Ltd (1988) 4 BCC 301.

[97] Sections 39 and 40 CAMA 2004

[98] Item Software (UK) Ltd v Fassihi (2005) 2 BCLC 91

[99] See John Shaw & Sons (Salford) Ltd v Shaw (1935) 2 KB 113

[100] Section 303 CAMA 2004; section 260 CA 2006.

[101] Section 63(5)(b) CAMA 2004.

[102] Section 279(5) CAMA 2004.

[103] Blackburn Building Society v Cunliffe Brooks & Co (1882) 22 ChD 61

From the above, direct lack of power will be disapplied where borrowing is properly incidental to the course and conduct of the business (like trading) of the borrower[104]. In other cases the borrowing would be ultra vires and thus void. However, that used to be the position.

The current position, with respect to company powers, is that a company shall not carry on any business not authorised by its memorandum and shall not exceed the powers conferred upon it by its memorandum or CAMA 2004.[105] Without more, cases such as the Blackburn Building Society v Cunliffe Brooks & Co (supra) will still remain relevant and on point. But this provision has not only been altered but has been largely watered down by the fact that no act of a company shall be invalid by reason of the fact that such act was not done for the furtherance of any of the authorised businesses of the company or that the company otherwise exceeded its powers.[106] In other words, the position is that there is nothing standing in the way of the company from entering into any transaction. This is a great relief to third parties who, without this provision, would have, to their own hurt, be left helplessly to bear all consequences of their error when they enter into a transaction with a company, which transaction was thereafter found to be ultra vires the company or its agents. In other words, third parties are protected to the fullest extent when they deal with the company, although, without their knowledge, the company or its agents lacked the requisite power to enter into the transaction in question.

(ii) Limitation of authority

One of the commonest situations which may necessitate a director exceeding his powers has to do with borrowing powers of the company. Frequently, articles of association of companies are couched to limit the extent to which the directors may exercise the power of the company to borrow money. For instance, in one of the companies incorporated by this writer, Clause 6.0 of the Company's Articles provides with respect to the borrowing powers of the Company that:

> The directors may exercise all the powers of the company to borrow money and to encumber its assets by way of security: PROVIDED that the board shall not exercise this power to borrow an amount equivalent to fifty percent of the share capital of the company without the approval first had and obtained of the shareholders holding not less than sixty five percent of the shares in the capital of the company.

The above provision only limits or restricts the powers of the board in respect of borrowing. It did not amount to total absence of power. This simply means that borrowing to the extent of 50% of the Company's authorised share capital is intra vires the directors. What if the directors purportedly exercised this power to borrow over and above the threshold? What will be the consequence of this action? Such a borrowing is clearly ultra vires the directors but intra vires the Company.[107] What is the effect of directors exceeding their powers? Orojo clarifies that:

> The power to borrow money may be regulated by the articles and where the directors' borrowing powers are limited; they must keep within those powers and also within the objects and powers of the company. The effect of 'unlawful borrowing' depends on whether it is ultra vires the company or merely ultra vires the directors but intra vires the company. If the directors borrow money on debentures in excess of the power given in the articles, the debentures are void[108], (but) since the act is not ultra vires the company it may be ratified.[109] (Emphasis added)

Generally, where the directors exceed their power with respect to any transaction, the law made provisions that shield innocent third parties from manifest harm. Thus it is the law that:

> no act of a company and no conveyance or transfer of property to or by a company shall be invalid by reason of the fact that such act, conveyance or transfer was not done or made for the furtherance of any of the authorised business of the company or that the company was otherwise exceeding its objects or powers.[110]

As for the company its only protection lays in restraining the directors by injunction from entering into the ultra vires transaction.[111] However, where the equities of an innocent third party have intervened, the company cannot avoid the transaction. In the circumstances, the directors who committed the ultra vires act will be

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[104] General Auction Estate & Monetary Co v Smith (1891) 3 Ch 432
[105] See Section 39(1) CAMA 2004
[106] Section 39(3) CAMA 2004; see section 39(1) CA 2006.
[107] Section 39(3) CAMA 2004; section 40 CA 2006
[108] English Channel Steamship Co v Roll (1881) 17 CHD 715
[109] Orojo, op cit, p. 168
[110] Section 39(3) CAMA 2004.
[111] Section 39(4) CAMA 2004

personally liable to the company. It must be pointed out that the protection to the third party is not licence to imprudence on the part of the third party. Thus, it is wisdom to check the company's memorandum and articles for corporate power before entering into significant transaction, like a debt transaction. This can be done by conducting a search at the company's registry, or checking with the secretary. According to Fuller, conducting a search is the wise course to take because:

> (a) even though the creditor may have the protection of s 35[112], the directors who approve an ultra vires transaction may be liable to the company; (b) lack of corporate capacity limits the actual authority of the company's agents, and therefore the creditor is not fully protected unless the requirements in relation to authority are also satisfied; and there is the risk that the creditor, depending on his equity[113], (c) may be required to hold any proceeds received under a transaction that is beyond the company's capacity as constructive trustee for the company.[114]

As to (a) above, it means that, subject to the terms of his appointment or the provisions of law, the director may be removed from office, and this can adversely affect the creditor, albeit the company is liable on the transaction. Thus, if the creditor sues to recover, the company can comprise the suit by cross action against the erring directors in which the creditors are joined. Meanwhile the capital investment of the creditor is locked up in the company's system.

As to second (b) ambit of Fuller's statement, the requirements in relation to authority are very generous to third parties. In Nigeria any person having dealings with a company or with someone deriving title under the company are entitled to presume (and the company shall be estopped from denying its truth) that:

> every person described in the particulars filed with the Corporate Affairs Commission (Nigerian Companies Registry) as a director, managing director of the company or secretary of the company or represented by the company, acting through its members in general meeting or board of directors has been duly appointed and has authority to exercise the powers...[115] (Emphasis added)

The foregoing presumption adds force to earlier provision which makes acts of members in general meeting, the board of directors and the managing director the acts of the company.[116] The presumption creates agency by estoppel against the company in favour of a third party. To take effect, the company must have taken steps to represent the person to the whole world, and consequently held him out, as a director, albeit there may be defects in his appointment. Any act by the person will bind the company.

To take benefit of this presumption, the company must have made the representation, which produced a belief in the mind of the third party leading to the act of the third party. The representation may be by words (as in writing a letter identifying someone as a director) or conduct (as in placing a person in a position where she normally has authority to do a particular act). The representation may be intentional or negligent. Hence, it has been held that to presume representation and thus bind the company, three ingredients must be present:

> Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel and a party cannot call in aid an estoppel unless three ingredients are present (1) representation, (2) a reliance on that representation and (3) an alteration of his position resulting from such reliance.[117]

Three further points need to be made with respect to representation. One, it has been held that representation by the company must convey the clear message that the ostensible director has been duly appointed and has authority to do a particular act on behalf of the company.[118] Secondly, the representation must be made to the person seeking to hold the company liable. This means that if the person relying on the presumption has never heard of the company any reliance on section 69 presumption will fail.[119] That is any reliance on the presumption must not be based on the belief that the apparent director has been duly appointed and has authority of the company to act. Three, the job title of the officer, corroborated by evidence of the usual

[112] Section 39(3) CAMA.
[113] Per Lord Cowper, he that has Notice has no Equity at all: Oxwith v Plumber (1708) Gilb Ch. 13.
[114] Fuller, G., Corporate Borrowing: Law and Practice Fourth edition (Bristol: Jordans, 2009) p. 159
[115] Section 69(b) CAMA 2004
[116] Section 65 CAMA 2004
[117] Per Slade J in Rama Corporation Ltd v Proved Tin & General Investments Ltd (1952) 2 QB 147 at pages 149-150
[118] Colonial Bank v Cady (1890) 15 App. Cas. 267
[119] Farquharson Bros v King & Co (1902) AC 325

authority of an officer with such a title would have in the kind of business of the company, could be the only evidence of holding out.[120]

Moreover, the law made additional protections for third parties with respect to the validity of the acts of company agents. In this connection, the acts of a director, manager, or secretary shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.[121] The UK regime[122] went a step further by validating the acts of such a director even if it was afterwards discovered that he had ceased to hold office or, was validly appointed but was not entitled to vote on the matter in question, and the protection still applies even if the resolution by which he was appointed is void under the law.[123]

At this point, it must be noted that there are limitations to the application of presumption in favour of third parties and there are limits to the liability of the company with respect to the authority of the directors to act on behalf of the company. In the first place it is important to note proviso (ii) to section 69 CAMA 2004 which states that:

> a person shall not be entitled to assume that any one or more of the directors of the company have been appointed to act as a committee of the board of directors or that an officer or agent of the company has the company's authority merely because the company's articles provided that authority to act in the matter may be delegated to a committee or to an officer or agent.

That is, the protections will not be available where the transaction is purportedly entered into by a committee or an officer or agent who was neither authorised by the board nor held out by the company. This is a caveat which third parties are expected to heed, after all *ex abundante cautela*. Equally, the presumption will not be satisfied if the third party had actual knowledge of absence of power at the time of the transaction in question[124] or there were circumstances putting her on inquiry, especially where she has a close commercial relationship with the company and consequently knows of, but deliberately chooses to turn blind eyes to, the absence of power or of the irregularity.[125] Also the binding effect of such transactions cannot scale through where the transaction was the offshoot of a board decision purportedly taken at an inquorate or improperly constituted board meeting.[126] In contrast, under the CA 2006 regime[127] where the other parties to the ultra vires transaction include a director of the company or its holding company or a person connected with such a director the protections are inapplicable.[128] Although no simile express provision obtains under CAMA 2004[129], it is submitted that it can be extensively construed to include such class of persons so that such a transaction can be rightly voidable at the instance of the company.

Furthermore, the above provisions cannot be used as a cover to commit wrongdoing or perpetuate fraud on the company. Accordingly, the company will not be bound where there is collusion between the company's agent and the third party.[130] Where collusion is shown, the third ambit of Fuller's statement will apply to the effect that the third party "may be required to hold any proceeds received under a transaction that is beyond the company's capacity as constructive trustee for the company". But where no collusion is disclosed and the agent acted fraudulently with reference to the particular transaction, the liability of the company to the third party remains unaffected thereby. This is because the third party never knew of the fraud on the part of the agent and should not be made a scapegoat of the agent's fraud. Where the person was never appointed but rather she nominated herself, and proceeding on behalf of herself, represented herself to the outside world that she is duly appointed a director and has authority to act, in so far as the company did not hold her out in any way, any acts of such a person cannot bind the company[131] because *fraus est odiosa et non praesumenda*[132]

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120 Ebeed v Soplex Wholesale Supplies Ltd (1985) BCLC 404
121 Section 260 CAMA 2004
122 Section 161 CA 2006
123 See section 160 CA 2006
124 In line with Turquand Rule, albeit the third party might have actual or constructive notice of the contents of the company's memorandum and articles, he will not be required to satisfy himself that internal procedures referred to in the articles had been complied with.
125 Section 65(a) CAMA; Fuller, op cit, p. 162
126 Longe v FBN plc (supra)
127 Under section 35 and 35A CA 1985; section 40 CA 2006.
128 See section 322A CA 1985; section 41 CA 2006
129 See sections 65 and 69 CAMA The proviso to section 65 among others provides "or if having regard to his position with or relationship with the company..." See also section 69 CAMA and the proviso thereof
130 Section 70 CAMA 2004
131 Section 250 CAMA 2004.
132 Fraud is odious and will not be presumed.

Fundamentally, an act that is ultra vires the company, may not affect the transaction concerned, but it will effectually limit the actual authority of the company's agents. This places a duty of diligence on a third party to satisfy herself that the requirements as to presumptions and authority of company agents together with the provisos thereof are met. No doubt company law made adequate protections for innocent third parties who may be dealing with the company. This is because that is the only basis third parties can be assured that the directors, not being owners of the business, are not suffering under any disability while going about their duties to the company. Also, it is in keeping with the trust proposition to the effect that men in responsible positions should be trusted until there is reason to distrust them.

Consequently, by making the company liable for all acts of directors, notwithstanding any defect in their appointment or the absence of authority, the law only seeks to perpetuate the doctrine of separate legal personality and thereby strike a bargain for third parties who deal with the company.[133] In other words, the law has succeeded in removing any uncertainty likely to be playing in the minds of third parties as to "whether the company has the capacity to enter into a transaction and whether the agent has the authority to bind it"[134] with respect to the transaction in question. Without doubt, the law achieved equity for the third party. What about the company, one would enquire?

3.2 Protection of the Company

So far, it has been seen that corporate managerial powers devolved to the board on the supposition that they should be trusted until the reason to distrust them ensues. But this is idealistic, because corporate management rarely serve the interests of the company. Rather they preoccupy themselves with unbridled commission of managerial slack. Intent on guarding against this, the law made provisions for the protection of the company. To achieve protection for the company, the law uses a mixture of rules and standards to guard against managerial misbehaviour. Cahn and Donald brought out a fine distinction between standards and rules:

> A "standard of conduct" prescribes how a person should act or fulfil a function or task, and it operates as an open-ended measure against which the quality of performance can be assessed *ex post.* A "rule", by contrast, names something specific that the management must do or not do. Standards flexibly adapt to acts and procedures that are not foreseen in their entirety when the standard is written, but standards can also create legal risks for directors because the scope of their requirement is often difficult to foresee. Rules, on the other hand, offer bright lines that are easy to apply, but for the same reason they can also be easy to evade – give that their parameters are clear and inflexible – unless they are arranged with sufficiently contiguous density, and often fail to account for changing circumstances.[135]

Thus, standards of behaviour allow sufficient discretion to directors to exercise their powers and take necessary risks. But standards protect the interest of members as a whole where the directors embark on actions which feather their nest. Examples of standards include duty of skill and care, fiduciary obligations (duty of loyalty) and conflict of interests duties. Conversely, rules are prophylactic in that they are set up in advance to address and reduce situations in which a director has high probability of committing infractions as he goes about observing the standards. That is, rules cover all of the situations in which conflicts of interest normally arise. Examples of rules which are prophylactic in nature include the statutory provision that the term of any *service contract* between a director and the company exceeding five years must be approved by the shareholders following full disclosure of the terms of the contract;[136] and a provision 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 who had dealings with the company.[137]

Generally, the standards are owed to the company. The interests of the shareholders as a whole represent the interest of the company. Of all the duties, fiduciary obligation is most basic and underpins all other duties. For instance, a director is expected to exercise duty of care and skill in his duties to the company. No degree of competence and reasonable care would meet the demands of this duty if the director is shown to have exercised this duty dishonestly or disloyally. This means that fiduciary duty is different from non-fiduciary duty. It equally

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[133] Talbot, L.E., Critical Company Law (Oxford: Routledge-Cavendish, 2008) p. 70.
[134] Cahn and Donald, op cit, p. 313
[135] Cahn and Donald, ibid, pp. 332-333
[136] Section 291 CAMA 2004; but see section 188 CA 2006 which puts the duration at two years.
[137] Section 287 CAMA 2004; but see section 176 CA 2006 which uses the word 'benefit'.

means that "a breach of fiduciary duty can occur without a breach of non-fiduciary duty."[138] For this reason only the codified fiduciary obligations of directors has been considered in this section.[139]

(i) Fiduciary obligations of directors[140]

Fiduciary relationship is present where, in a relationship, one party enjoys discretionary power over the significant practical interest of another. It is characterised by the fact that "the fiduciary (e.g., a director) obtains power from the entrustor (e.g., members in general meeting) for the sole purpose of enabling the fiduciary to act effectively".[141] (Emphasis added) Thus, fiduciary obligation arises in any relationship in which one party is given discretionary power to affect the legal or vital practical interests of the other party. Thus a fiduciary is "a person who agrees, or undertakes, to act for, or on behalf of, or in the interests of, another person in the exercise of a power or of discretion which will affect the interests of that other person in a legal or practical sense"[142]. This means that there cannot be fiduciary obligation where the fiduciary lacks discretionary power.[143] The presence of discretionary power is a potential danger area as far self interest is concerned. This explains why a requirement to abstain from self-interest behaviour is a core element of fiduciary duties of directors.[144] In other words, fiduciary obligations performs protective function, for without it self-interest would lead the director in an entirely opposite direction as far as his duty to the company is concerned. Thus, self-interest is the "very evil" against which fiduciary obligation is directed.[145]

One aspect of the fiduciary duties[146] of a director is the duty to observe utmost good faith towards the company in any transactions with or on behalf of the company[147] and to act in what he believes to be the best interest of the company as a whole[148]. In the discharge of this duty, the director must similarly have regard to the company's employees in general[149]. As a preliminary, the duty to act bona fide[150] in the interests of the company is owed to the company and not to individual shareholders. However, the duty can be owed to individual shareholders where the director acts as an agent of the shareholder[151]. On this, it has been held that once it can be shown that there was a special factual relationship between the directors and the shareholders in the particular case, fiduciary duties shall be owed to the shareholders[152]. It has been argued that the duty to have regard to the interest of members is "vague and the possibility of enforcement is remote, for the duty is owed by the directors to the company and the company alone"[153]. This is not so[154]. For instance, the duty is not owed to the company's creditors[155], yet where the company is in the vicinity of insolvency, the directors become automatically bound to act bona fide in the interests of the creditors.[156] The means the creditor can successfully maintain an action for grounds that the affairs of the company are being conducted in an illegal or oppressive manner[157].

How do we test the good faith conduct of the director? It is tested on commonsense principles and proceeds from the court asking itself whether it is proved that the directors have not done what they (the directors, not the court) honestly believed to be right. That is, the test is as to the director's state of mind[158], a subjective test indeed. On

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[138] Conaglen, M. Fiduciary Loyalty (Portland: Hart Publishing, 2010) p. 65
[139] For detailed treatment of other duties, see Onamson, F.O., (2011) "A Critical Examination of Remedies for Corporate Maladministration under Companies and Allied Matters Act (CAMA) 2004" (unpublished) LLM Dissertation, Department of Commercial Law, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria, pp 43-59
[140] Section 279(1) – (9) CAMA 2004
[141] Frankel T., (1983), "Fiduciary Law" California Law Review Vol 71, p. 809. Available online at http://scholarship.law.berkeley.edu/ californialaw review/vol71/iss3/1 (Accessed 12/9/2015)
[142] Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41
[143] Guerin v The Queen (1964) 2 SCR 335: cited in Miller, P.B., (2011), "A Theory of Fiduciary Liability" McGill Law Journal Vol 56, No 2, pp. 262-263
[144] Smith, G.D., (2002), "The Critical Resource Theory of Fiduciary Duty" Vanderbilt Law Review. Vol 55, p. 1459
[145] Aberdeen Railway Co v Blaikie Bros (1854) 30 ER 1248
[146] Other aspects of this duty, not considered in this Paper, include duty not to act for a collateral purpose (section 279(5) CAMA 2004; section 171 CA 2006; Imperial Group Pension Trust v Imperial Tobacco (1991) 1 WLR 589); duty not fetter their discretion (section 279(6) CAMA 2004; section 173 CA 2006); to delegate but not abdicate duty (section 279(7) CAMA 2004; section 171 CA 2006)
[147] Section 279(1) CAMA 2004
[148] Section 279(3) CAMA 2004
[149] Section 279(4) CAMA; section 309 CA 1985. In Okeowo v Migliore (supra), Eso JSC quipped that "it is the duty of the directors of a company to exercise powers vested in them for the benefit of the company. Their fiduciary relationship is not for individual advantage but for the company".
[150] Section 279(3)-(4) CAMA 2004
[151] Section 279(2)(a) CAMA 2004; Coleman v Myers (1977) 2 NZLr 225
[152] Peskin v Anderson (2001) 1 BCLC 372; Platt v Platt (1999) 2 BCLC 745
[153] Thorne, J., and Prentice, D., (Eds) Butterworths Company Law Guide, Fourth edition (London: LexisNexis, 2002) p. 212.
[154] See above notes 103 and 104, p. 38. It can be owed to individual shareholders and any person not being a member.
[155] Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd (1983) Ch 258
[156] West Mercia Safetywear Ltd v Dodd (1988) BCLC 250; Kinsela v Russell Kinsela Pty Ltd(1986) 4 ACLC 215 at 223
[157] Section 310 CAMA includes a creditor as a person qualified to bring an application under section 311 CAMA.
[158] Regentcrest Plc v Cohen (2001) 2 BCLC 80

this premise, even where the company suffers substantial harm grounding liability may be a herculean task. This hard stance of the law is to exclude the courts from second-guessing the decisions of the board as to where the best interests of the company lie[159]. It means that the company can expect little succour from this aspect of directors' duties, if the directors, as they often do, in fact do stray from the prime task of promoting the interest of the company[160]. Little reliance, then, can be placed on this duty as an insurance against managerial misbehaviour. The company is not efficiently protected.

Similarly, in the US jurisdiction, the business judgment rule is used to weaken the force of the requirement as to what the director honestly believed to be the best interest of the company. The rule is founded on the presumption "that in making a business decision the directors of a corporation acted on an informed basis, and in the honest belief that the action taken was in the best interest of the company and its shareholders".[161] Of the rule, it is said that it serves to protect and promote the role of the board as the ultimate managers of the company.[162] As such it operates to preclude the courts from second guessing the decisions of the managers. If it were not so, the court would be imposing itself unreasonably on the business and affairs of a company. Accordingly, where no fraud, bad faith or self-dealing is disclosed on the part of the directors the presumption will apply and the decisions of the directors upheld.

Perhaps and principally to solve the problems of measuring the observance of fiduciary standards, the UK regime introduced the enlightened shareholder value precept into the director's fiduciary duties. In this connection, the CA 2006 requires the directors to have regard to a range of matters in promoting the interests of the members as a whole, and these are –

> the likely consequences of any decision in the long term; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as between members of the company[163].

According to Talbot[164] this "take into account after shareholders" provision embodies the enlightened shareholder value (ESV) approach[165]. This requirement to take into account these material factors is what injects and infuses the "enlightenment" into the shareholder value precept. It is the directors that need the enlightenment. Thus, if the company is a going concern, meaning shareholder interests are well taken care of, it will do the shareholders no good if the company has dissatisfied customers, faces an antagonistic government or regulatory agency and has angry pressure groups bumping into its annual general meetings[166]. This provision helps the directors to direct the affairs of the company in a socially responsible manner and provides the basis for justifying actions which will promote the interests of stakeholders since it will facilitate and enhance the attainment of shareholder interests[167]. This pluralistic approach of the English legislation is much to be preferred, and it synchronises the company with the society. Thus business as the economic organisation of society becomes a private property in a qualified sense, as the society now has a right to demand that it be conducted in a way that protects the interest of all stakeholders[168]. This must be so, even though it may thereby result in the curtailing the proprietary rights of the shareholders.

However, it has been submitted that this provision may unwittingly result to paper trail effect. Thus, in order to stave off likely claims for breach of this duty the directors will not only monitor the basis of their deliberations, decisions and actions, they will also establish appropriate processes where they have delegated their powers[169]. On their part, Sealy and Worthington disagree with the paper trail effect insisting that "the list of factors is non-exclusive and is intended to illustrate elements of the wider principle that directors are required to make good

[159] Davies, Principles of Modern Company Law, p. 389. This may be on the basis that the court does not have expertise on the matter.
[160] In CA 2006 the wording is "promoting the success of the company for the benefit of its members".
[161] In Re the Walt Disney Company Derivative Litigation 907 A2d 693 (Del Ch, 2005): cited in Cahn and Donald, p. 383
[162] Cahn and Donald, op cit, p. 393
[163] Section 172(1)(a)-(f) CA 2006.
[164] Op cit, p. 183
[165] CAMA in section 279(4) and 342(5) has veiled reference to enlightened shareholder value.
[166] Davies, Principles of Modern Company Law, p. 378.
[167] As Bowen LJ in Hutton v West Cork Railway (1883) 23 ChD 673 reminded that "the law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company." Otherwise the company could be killed by kindness.
[168] See Dodds, M., "For whom are Managers Trustees?", (1931-32) 45 Harv L Rev 1162.
[169] Smerdon, op cit, pp. 91-92. Chambers, op cit, at pp 348-349, agrees that paper trail is a real danger and defect of the ESV precept.

faith business judgments to promote the success of the company".[170] Whatever the case, the provision keeps the directors on their toes, because it has succeeded in giving an insight into the factors or issues that would, or should, form the basis of the director's state of mind.

4 Remedies for abuse of corporate managerial powers

By devolving corporate managerial powers to the corporate management, the expectation is that the members in general meeting would be able to organise their affairs in such a way that confidence and trust can be reposed in the corporate board. This they can do by articulating their articles in such a way that chances for abuse of managerial power are curtailed.[171] That is why the law insists that the directors, acting within powers and subject to good faith and due diligence, can take decisions against the wishes of the members, and the members cannot control them in the exercise of these powers while they remain in office[172]. In any case where the board acted bona fide and with due diligence and the action amounted to disobedience of instructions or directions of members, the only sense that could be made of such a situation is that the members desired to procure the board to commit a wrongful or an unlawful act, since an act cannot be bona fide and mala fide at the same time.

However, the principal question is what if the directors act against clear provisions of the article so that their action in respect of a particular matter becomes ultra vires the directors but intra vires the company? Or what if the directors acting within powers chose deliberately to act mala fide? Considering that, generally speaking, the company is liable for the acts of its primary organs[173] on the basis that, as an artificial entity, the company is not capable of acting "*in propria persona"* but can only incur liability through its decision agents[174] what remedies are there for the company where the decision agents are steep in opportunism?

4.1 Restrain the Doing of the Ultra Vires Act

There are two ways by which managerial abuse of corporate powers can be checked. The first way to restrain corporate management from embarking on or continuing with acts ultra vires their powers is through the articles. In the UK this can be achieved through entrenched provisions in the articles[175] or by amending the articles. However, this is a weak remedy, because the members in general meeting can be subject to manipulation by the directors through proxy machinery exacerbated by unhealthy shareholder passivity in Nigeria.[176] Except the articles contained restrictions on managerial powers ex ante, this remedy, ex post excess of power, is attempting to lock the stable door after the horse had bolted out since no alteration of the articles shall invalidate any prior wrongful act of the directors.[177] Even if it is so, the case of the company is not helped, since acts ultra vires the directors do not relieve the company of liability to third parties. Thus, if this is the only remedy available for restraining excess of power, the company would be the worse for it.

Secondly, the managers can be restrained by action from embarking on ultra vires transaction. This is achieved by application for prohibitive injunction against the doing of any act that would amount to the company exceeding its objects or powers.[178] The efficiency of this remedy is dependent on how adept members are in their monitoring role. The efficiency of the monitoring is subject to the amount of relevant information at members' disposal. Thus corporate management could exploit asymmetric information to ensure that infractions are not discovered before their occurrence. In any case members will rely on the board of directors who, too, may be victim of information asymmetry or may be weakened by CEO board capture or may be complicit in managerial slack.

4.2 Remove the Erring Member(s) of Corporate Management

In Nigeria, the law set up the shareholders as an interventionist and remedial device against opportunism. To this end, the shareholders can remove erring director(s) by ordinary resolution. It is not so easy in practice because the diffuse and disparate character of members make it difficult for them to co-ordinate effectively.[179] This is

[170] Sealy and Worthington, op cit, p. 321; Also Lord Goldsmith agrees: cited in Walmsley, K. (Ed) The ICSA Companies Act 2006 Handbook (London: ICSA, 2007) p. 10
[171] Under the CA 2006 this can be easily achieved through the use of provisions for entrenchment (see section 22 CA 2006)
[172] Section 63(4) CAMA; Howard Smith Ltd v Ampol Petroleum Ltd (1974) AC 821.
[173] Section 65 CAMA 2004
[174] Kurubo v Zach-Motison (Nig) Ltd (1992) 5 NWLR (Pt 239) 102; Trenco (Nig) Ltd v African Real Estates Ltd (1978) 1 LRN 146; Ladejobi v Odutola Holdings Ltd (supra) 130; GSS Ikachi & ors v Igbudu (2005) 12 NWLR (Pt 940) 543
[175] Section 22 CA 2006
[176] Onamson, A Critical Examination of Remedies for Corporate Maladministration under CAMA 2004, p. 24.
[177] See section 63(6) CAMA 2004
[178] See sections 39(4) and 40 CAMA 2004
[179] Guliffer L, and Payne J., Corporate Finance Law: Principles and Policy (Oxford: Hart Publishing, 2011) p. 72.

exacerbated by the nature of shareholding structure in Nigerian companies. For instance, as at 2009, 94,685 shareholders representing 75% of the shareholders held only 1.45% in the capital of Diamond Bank plc; whereas only two shareholders held 25% of the bank's shares. In Dangote Sugar Refinery plc 89,340 shareholders representing 81% of the shareholders held 1.76% of the company's shares, while 68% of the company's shares are held by one institution owned by the chairman of the company. Since those on board might be significant share-owning directors, this makes it near-impossible to remedy abuse of managerial powers by way of removal of the affected officer. Thus, when the company suffers over wrongful acts of directors it may actually be suffering of the minority.

4.3 Derivatively proceed against those in control[180]

Apart from restraining the directors or removing the errant director, members can bring an action against the officers where the acts had been completed. In most cases where the company through its officers exceeds its power, the motivation might be greed other than the interest of the company. This forecloses the room that those in control will sue to remedy the wrongful act. Except this course is pursued by a member(s), the company helplessly suffers the crass malfeasant acts of its managers. And many of such acts might have gone without remedy.

5 Conclusion

When the board is negatively active, the best interest of the company suffers because it will be neither promoted nor protected. When the interest of the company is mortgaged by reason of board's failure in its decision control function, the company suffers. But that is not completely true, since the interest of the company means the interest of the shareholders as a whole. Based on the principle of majority rule, it is likely that board appointments would be largely, if not completely, influenced by shareholders with significant holdings in the capital of the company. Even the presence of independents on the board is not necessarily an insurance against managerial slack since formal independence does not translate to functional independence and by extension board independence. Now where the board is negatively active only a segment or class in the company will bear the brunt of the board's opportunism. This will be the minority, who might have no say, or might not have their way, in influencing board appointments. Similarly, asymmetric information will ensure that the minority do not learn of managerial slack to be able to prevent or remedy it. Already, third parties are protected to the fullest extent, but this protection, for those whose interests are non-adjusting (e.g., unsecured creditors), becomes precariously endangered where the company slips into insolvency. The agenda should be to develop systems which synchronise the company with society because whenever a company fails it leaves multiplier effects on the society.[181] The UK regime has taken the plunge with the ESV precept. As the concept evolves, and is embraced by other regimes, it can only get better.

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[180] The scope of this paper does not accommodate full and extensive treatment of derivative action. For greater detail see Onamson, A Critical Examination of Remedies for Corporate Maladministration under CAMA 2004, pp 112-122

[181] The German-style co-determination is great as employees have greater incentive to ensure that the company is properly managed.

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