



UNIVERSITY OF LAGOS, NIGERIA

Inaugural Lecture Series 2015

TOPIC:

**THE MONSTER THEORY: SETTING
THE BOUNDARIES OF CORPORATE
FINANCIAL MALPRACTICE**

By

PROFESSOR JOSEPH EFYEMINENI OROMAFUNU ABUGU

25
15

THE MONSTER THEORY: SETTING THE BOUNDARIES OF CORPORATE FINANCIAL MALPRACTICE

An Inaugural Lecture Delivered at the University of Lagos
Main Auditorium on Wednesday, 8th April, 2015

By

**PROFESSOR JOSEPH EFEYEMINENI
OROMAFUNU ABUGU**

LL.B (Hons) (UNN); B.L; LL.M; Ph.D (Lagos); MNIM

**Professor and Head of Department
Commercial & Industrial Law
Faculty of Law**

University of Lagos

University of Lagos Press and Bookshop Ltd

© Joseph Efeyemineni Oromafunu Abugu, 2015

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the author.

Published

By

University of Lagos Press and Bookshop Ltd
Unilag P.O. Box 132
University of Lagos
Akoka – Yaba, Lagos
Nigeria.

ISSN 1119-4456

PROTOCOL

The Vice-Chancellor;
Deputy Vice-Chancellor (Academic & Research);
Deputy Vice-Chancellor (Management Services);
The Registrar;
The Bursar;
The Librarian;
The Provost, College of Medicine;
The Dean of Law;
Deans of Faculty, here present;
Members of Senate, here present;
Heads of Department, here present;
Distinguished Academic Colleagues;
Distinguished non-academic Colleagues;
Distinguished Guests;
My Dear Students;
Ladies and Gentlemen of the Press.

Preamble

My Vice-Chancellor, Sir, it is indeed epochal that I stand here today to deliver my inaugural lecture as a Professor of Law of the University of Lagos, the Ivy League University of Africa, the nation's pride and students' first choice, a feat I achieved in seventeen years of service (1995-2012). From humble beginnings at Urhobo College, Effurun in the seventies, the quest for academic laurels saw me passing through the Centre for Business Studies, London; the University of Nigeria, Enugu Campus; and the Nigerian Law School, culminating in my Call to the Nigerian Bar in 1989. From that point in my life, my ambition was to venture into corporate legal practice and explore *the exotica* of the noble profession. So strong were my dreams that when the Faculty of Law, University of Nigeria commended my excellence at graduation and offered me a ticket to teach, I politely declined. Unknown to me, faith had my route to that

unique end planned a bit differently. Instead of an immediate legal practice vocation, I enrolled in the LLM programme of this great university after National Youth Service and thus started my journey here. Six years down the line, in 1995, I had to accede to the gentle prodding of Professor Emmanuel Oladeji Akanki to accept a teaching position in the Faculty of Law of this great institution. As a young lecturer, in 1998, the Rotary International, District 9110 found me sterling for appointment as a Rotary Youth Exchange Ambassador to the State of Illinois, USA. That started my subsequent forays into the American social, cultural, legal and investment landscape. Five year later, following a competitive selection process, I was nominated as a Fulbright Scholar by the American Government under the auspices of the Institute of International Education. This funded my stay at the Chicago-Kent College of Law, Centre for Financial Markets for an academic year. This Centre is renowned as the only one of its kind in North America and it was there that I concluded the writing of my Ph.d Thesis in Company Securities. The rest, as they say, is history, and here I am a Professor of Law, University of Lagos, Nigeria, an appointment that took effect from 1st October 2012. In the past twenty years, I have been expounding the principles and boundaries of corporate law and its sister subject – securities law, which I have striven to delineate from corporate law as a distinct strand of study and research in Nigeria. I make bold to say I am the first Nigerian Professor of Company Securities Law. It is, therefore, in this area that I have chosen the title and theme of today's lecture. I present to you: THE MONSTER THEORY – SETTING THE BOUNDARIES OF CORPORATE FINANCIAL MALPRACTICE.

My Lecture

My Vice-Chancellor, Sir, distinguished audience, Monsters roam everywhere! Some are self-created, manufactured by conscious effort or created by default, inattention to detail or outright ineptitude. Your monster is that which haunts you and robs you of your just deserts. It may be an inherent vice that continually diminishes your returns. I now ask you: Which is your monster?

In the context of companies and company administration, it is my goal to depict to you the monster in the corporate form of doing business; aspects of which are created by our legislators failing to give attention to detail and in default of attending to the causes of corporate failures. Other aspects are attributable to the puppeteers who run corporate organisations – directors and managers and, of course, our human nature to constitute ourselves ‘monsters’ to everything around us in the quest for dominion and maximisation of profits. I conceive the modern corporation and its directors/managers as monsters created by the law that must be gagged, tamed and made amenable to the wealth-creating objectives of investors of capital. The central theme of this lecture is how directors and managers of companies have constituted themselves monsters for investors of capital. It will show how the law has grappled with these monsters, the shortcomings of the extant legal regime and suggestions to hold these monsters more responsible to investors and society.

The corporate form of doing business has evolved over time as the flag-ship of modern enterprise. Its ability to raise capital for great entrepreneurial undertakings has proven a pivotal engine for economic growth. In every land and clime, modern business is carried out in the name of companies. Time there was, when a company

promoter must gather a minimum of seven persons to be able to achieve incorporation status.¹ Today, the corporate form is more readily assumed, in some jurisdictions, by only one man² and in others, it can be bought off the shelf.

Two concepts have made the corporate form the darling of modern enterprise: the concept of corporate personality and that of limited liability.

The Corporate Personality Principle

The first comprehensive English statute on company law, the Companies Act 1856, laid the foundation of the concept of corporate personality in its section 13, a section replicated in section 6 of the Companies Act 1862 which was given full attention, analysis and affirmation in the famous case of ***Salomon v. Salomon & Co. Ltd.***³ This was a case of a man who, in concert with his wife and 5 children as shareholders, converted his shoe-making business into a limited liability company by registration under the English Companies Act 1862. The central issue in the ensuing litigation was whether the company was one and the same person as its principal promoter/shareholder and director. In a considered judgment of the English House of Lords, (the then highest court in England), the Law Lords (Lords Halsbury L.C, Herchell, Macnaghten, Morris and Davey) x-rayed the nature of legal personality that is assumed upon incorporation of a company. According to Lord Halsbury in the lead judgment, the most important question “is *whether the respondent company was a company at all* -

¹ See Joint Stock Companies Act 1844, 1856 and the Companies Act 1862.

² See English Companies Act, 2006.

³ (1897) A. C. 22.

whether in truth that artificial creation of the legislature had been validly constituted in this instance; and in order to determine that question it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself." He came to the conclusion that the company was duly incorporated according to the provisions of the extant Companies Act, acknowledging that it had seven actual living persons as required by the Act; that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough. He held that once the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are. Lord Halsbury stated thus:

I will for the sake of argument assume the proposition that the Court of Appeal lays down - that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

Again, at page 51 of the said judgment, in lending support and affirming the separate and distinct personality of a limited liability company, Lord Macnaghten reasoned:

The company is at law a different person altogether from the subscribers ... and though it may be that after incorporation the business is precisely the same as it was before, and that the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the Act.

The thrust of this judgment is that it is not contrary to the true intent and meaning of the Companies Act for a trader, in order to limit his liability and obtain the preference of a debenture-holder over other creditors, to sell his business to a limited liability company consisting of himself and six members of his own family, the business being then solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the Act being complied with. The company thus formed is a legal person capable of rights and liabilities independent of its shareholders. In ***Dunlop Nigerian Industries Ltd v. Forward Nigeria Enterprises Ltd & Anr⁴***, Ajose-Adeogun J re-stated and applied the principle thus:

To begin with, the argument... that the second defendant and his wife are the directors and shareholders of the company, and that he holds 90%

⁴ [1976] 1 A.L.R. Comm. 243; [1976] N.C.L.R. 243; See also *Banque De L' Afrique Occidentale v. Habu Iliasu & Savage, In re Northern Nigeria marketing Board (Garnishee)*, [1964] N.N.L.R. 30.

of the shares, appears to ignore or misconceive the very essential principle of the independent corporate existence of a limited liability company...It does not matter if the company's shares are owned substantially by one of the shareholders with only a very small fraction held by one or a few others. The Act by which a limited liability company is incorporated is not concerned with the quantum of interest of its members. Some of them may even hold such nominal or minute interest that it may qualify them to be described as dummies. Nevertheless, such a company maintains its independent existence as a person distinct from any of its members irrespective of the number of shares held.

My Vice-Chancellor, Sir, it is to be noted that these decisions are at the root of modern commercial practice. It is now settled and a trite principle of corporate law, that when a company is duly incorporated according to the laws of the society, following English jurisprudence, a distinct legal personality springs into being with the legal attributes of a natural person. The ideas or schemes of those who brought it into existence become irrelevant. The principle is now enshrined in section 37 of the Nigerian Companies and Allied Matters Act.⁵

Limitation of Liability Principle

Next is the principle of limitation of liability which in a nutshell states that the liability of shareholders or members of a company, for the debts or other liabilities of the company, is limited to the amount of capital they have contributed or agreed to contribute to the capital of the company. This is captured in section 49 of the Nigerian

⁵ Cap. C20, Laws of the Federation 2004. Also referred to herein as "CAMA".

CAMA, that a member is only bound to contribute capital to the extent agreed in writing and shall not be bound by any alteration of the memorandum or articles requiring him to take more shares or increase his liability to contribute to the capital of the company or to pay money by any other means to the company. It is a rule with a profound history.

Before 1855, shareholders of joint stock companies, as they were then called, suffered unlimited liability, like partnerships, for the debts or other liabilities of the companies. The fraudulent disposition of early company promoters underscored why unlimited liability was desirable as a tool for holding them responsible to the public. Following progressive lobby pressure, limitation of liability for business incorporators was given its first affirmation in the English Limited Liability Act of 1855.⁶ The Act conceded limited liability to joint stock companies subject to certain conditions intended to prevent bubble companies:

- a. the minimum par value of issued shares was fixed at £10 with a minimum capital requirement of £250;⁷
- b. three-fourth of the nominal capital had to be subscribed;⁸
- c. the deed of settlement to be executed by at least twenty-five shareholders;⁹
- d. one-fifth of the subscribed capital had to be paid up and had to be verified by a declaration of the promoters;¹⁰
- e. the directors are to be jointly and severally liable for all the debts of the company if they declare and pay any

⁶ 18 & 19 Vict. C. 133.

⁷ Section 1.

⁸ Section 1(4).

⁹ Ibid.

¹⁰ Section 1(5).

dividend when the company is known by them to be insolvent or any dividend the payment of which would to their knowledge render the company insolvent;¹¹

- f. no loan shall be made to a shareholder and any officer of a company; making one or assenting to it shall make the officer involved liable to the full extent of such loan;¹²
- g. in the case of the annual report of any company with limited liability showing that three-fourth of the subscribed capital stock has been lost or has become unavailable in the course of trade, the trading or business of such company shall forthwith cease, or shall be carried on for the sole purpose of winding up its affairs; and the directors shall forthwith take proper steps for the dissolution and winding up of its affairs;¹³
- h. if one auditor only be appointed, that single auditor, or if two or more auditors be appointed, then one of such auditors shall be appointed by the Board of Trade;¹⁴

The legislators, no doubt, recognised the monumental consequence of limitation of shareholders' liability and made it a trade-off with these conditionalities. Regrettably, these conditionalities did not last long; most were done away with in the English Companies Act which followed the Act of 1856. The full rein of the concept was alluded to in **Salomon v. Salomon & Co. Ltd.**¹⁵ For according to Lord Macnaughten, *"the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the Act."*

¹¹ Section 9.

¹² Section 10.

¹³ Section 13.

¹⁴ Section 14.

¹⁵ (1897) A.C. 22.

The Monster Theory: Frankenstein in Corporate Garb

A company traditionally pools capital from a large number of persons to do business, the object being to make profit and create wealth for owners of its capital. However, corporate history is replete with frauds, corporate failures and scandals. Corporate failure manifests in insolvency or bankruptcy, often with allegations of unethical behaviour by people acting within or on behalf of a corporation. Investors perpetually live with the risk of losing capital, thus making investments in companies a very tenuous step. To the investor who has suffered any of the adverse fates of the capital market, a company is indeed a monster. A few examples will suffice:

- In 1494, the Medici bank owned by the Medici family in Italy, ran up large debts. Due to the family's profligate spending, extravagant lifestyle, and failure to control the managers, their bank went insolvent. It was the largest and most respected bank in Europe during its time. Investors and depositors' funds were lost.
- In the famous South Sea Bubble scandal of 1720, after the War of Spanish Succession, the UK signed the Treaty of Utrecht 1713 with Spain, ostensibly allowing it to trade in the seas near South America. In fact, barely any trade took place as Spain renounced the Treaty. However, this was concealed on the UK stock market. A speculative bubble saw the share price reach over £1,000 in August 1720, but then crashed in September. A Parliamentary inquiry revealed fraud among members of the Government, including the Tory Chancellor of the Exchequer, John Aislabie, who was sent to prison. Again, a large chunk of investors' capital was lost.

- In 1991, the failure of the Bank of Credit and Commerce International, BCCI, was attributed to grave acts of fraud, money laundering and larceny by the bank's directors and managers. Virtually all the bank's subsidiaries all over the world crashed with loss of investors and depositors' funds.
- In 2001, the American company, Worldcom amidst falling share prices, and a failed share buy-back scheme, went into bankruptcy. It was found that the directors had used fraudulent accounting methods to push up the stock price. Rebranded MCI Inc, it emerged from bankruptcy in 2004 and its assets were bought by Verizon.
- Prior to its bankruptcy in late 2001, Enron Corporation was a major energy company in United States. It employed around 21,000 people and was one of the world's leading electricity, natural gas, and communications companies, with claimed revenues of \$101 billion in 2000. Fortune magazine named Enron "America's Most Innovative Company" for six consecutive years. In the same year, the energy giant Enron failed when it was revealed that much of the company's profit and other resources of revenue were the results of sharp deals brazenly perpetrated with special purpose entities. A number of its executives were sentenced to prison.
- Another notable case is that of Bernard Madoff, a stockbroker and former chairman of the US NASDAQ OTC market who confessed to several securities fraud, false statements and false filings with capital market authorities in the US and theft from an employee benefit plan – the largest financial fraud in US history. Amount missing from clients' accounts was almost \$65 billion while actual losses to investors were estimated at \$18 billion. He was

convicted in 2009 and sentenced to 150 years in prison and forfeited assets worth \$17.179 billion.

- Closer home in Nigeria, the Vanguard Newspapers in its issue of November 19, 2007, quoting a study conducted by the Nigeria Deposit Insurance Corporation (NDIC), reported that the country had lost 75 banks between 1914 and 2007 due essentially to corporate governance failures.

In all the cases, shareholders and depositors lost money. However, very few convictions were recorded in Nigeria. Many of the directors/managers who constituted themselves monsters to defraud Nigerian investors continue to roam our streets and eat the delicacies of board room felicitations. They steal by stealth from investors. A 2002 publication titled, **Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy**,¹⁶ in its front cover depicts two gentlemen, wearing grey suits, one seating on a chair and the other on a coffee table, laughing heartily but each bearing the head of a monster bear. This is a classical caricature of company directors and managers.

The twin concepts of corporate personality/limited liability, conceived as vehicles or mechanisms for business development and growth has, however, become a 'Frankenstein monster', created in this case, by the law and preying on investors' capital. My first submission in this lecture is *that the corporate form of doing business is a veritable instrument for fraud and economic gain – two sides of a coin, one potentially evil and the other potentially benevolent with the allure of wealth and growth*. The twin

¹⁶ Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy, Toronto, Canada, Between the Lines Press, 1914.

concepts inherently provide versatile potentials for wealth generation and growth and for fraudulent practices at the same time. The concept of corporate personality and limitation of liability gives the company attributes that can be deployed for fraudulent means by shareholders and corporate managers. Companies, in spite of their paid up capital may undertake financial transactions of great magnitude which if lost in the ordinary course of business can never be recovered by its creditors. Members are only liable to pay the amount representing the number of shares subscribed in the company. Thus creditors may suffer the pain of the company's insolvency while the members remain in affluence, unless of course, some financial culpability of impropriety can be established against any of the members. This owing no doubt to the abstract legal personality that the law confers on registered companies. In spite of this shortcoming, the corporate form has proven to be an engine of economic growth across the globe as it facilitates the pooling of resources from diverse savers for great entrepreneurial endeavours. The advent of modern multinational or transnational corporations bears testimony to its utility in wealth and growth promotion.

History, we have seen above, is replete with malpractices committed using the device of companies. These are generally in two broad categories: (a) financial malpractices by promoters/shareholders perpetuated on creditors and unwary members of the public; (b) financial malpractices by corporate managers perpetuated on shareholders, creditors and unwary members of the public. The legal personality of companies provides an ethereal shield with which shareholders and corporate managers perpetrate these economic malpractices.

Promoters/Shareholders' Financial Malpractices

Financial malpractices of this type are more common in the rank of private companies. Minority shareholders in *de facto* control of public companies fall into this class as well. Here, shareholders-in-control typically use the corporate facade to further their personal goals and economic exploitation. A classic example will suffice. In the English case of **Wallersteiner v. Moir**,¹⁷ one Dr. Wallersteiner demonstrated the hold one man can wield on a company hiding behind the corporate façade. A German scientist who migrated to England, he controlled many concerns, one of which is the Rothschild Trust, akin to the English charity of repute, Guinness Trust. He chose the name as if it was backed by the famous banking house of Rothschild and so of great financial strength but it was nothing of the kind. It was actually an obscure entity of little worth registered in Liechtenstein, a tiny European state between Switzerland and Austria. He established a few others: Stawa A.G, Dellpa Trust also in Liechtenstein, and an Investment Finance Trust Ltd in Bahamas. With these a number of nefarious activities ensued:

- a. Dr. Wallersteiner in partnership with a Mr. John Dalglish who acting under a power of attorney for Camp Bird Ltd committed Camp Bird Ltd to large payments of commissions to Stawa AG, without reference to anyone;
- b. Dalglish committed Camp Bird to sell all its shares in Hartley Baird Ltd at 1s a share to the Rothschild Trust. The sum of £518,718.15s due thereon, was paid through several inter-company transfers, ultimately ensuring that Hartley Baird's funds were used for the payment. The Rothschild Trust did not spend a penny in cash for the shares. Another of Dr.

¹⁷ [1974] 1 W.L.R. 991.

Wallersteiner's companies, - Investment Financial Trust of Nassau and Anglo-Canadian Cement Co. Ltd registered in Nigeria, were used to achieve that end;

- c. Dr. Wallersteiner used many companies, trusts or other legal entities as if they belonged to him. He was in control of them as much as any "one man company". He made contracts of enormous magnitude on their behalf without reference to anyone else;
- d. He used their moneys as if they were his own; when money was paid to him for shares which he himself owned beneficially, he banked it in the name of Investment Financial Trust;
- e. His transactions always passed through the Anglo Continental Exchange Ltd, a merchant bank of which he was chairman and effectively controlled.

From its intricate facts, Lord Denning distilled the following:

I am prepared to accept that the English concerns – those governed by English company law or its counterparts in Nassau and Nigeria – were distinct legal entities. I am not so sure about the Liechtenstein concerns – such as the Rothschild Trust, the Dellpa Trust or the Stawa A.G. There was no evidence before us of Liechtenstein law. I will assume, too, that they were distinct legal entities similar to an English limited company. Even so, I am quite clear that they were just the puppets of Dr. Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed

*into legal language, they were his agents to do as he commanded. He was the principal behind them.*¹⁸

Many Mr. Wallensterneirs roam our streets and corporate board rooms bestriding investors' capital as predatory monsters. They expend company funds without recourse to anyone and thereby deplete shareholders' wealth.

At this point, my Vice-Chancellor, I wish to highlight two inherent elements of human nature that make the corporate form an ideal vehicle for fraud. The first of these is my proposition that *the easiest money to spend is other people's money*.¹⁹ *We naturally tend to be more indulgent and profligate when we administer or spend other people's money.* This scenario typically plays out in companies where those who manage are different and separate from owners of capital. Professors Berle and Means in their seminal work, **The Modern Corporation and Private Property**,²⁰ researched the consequences of ownership and control being separate and underscored the need to hold managers accountable as businesses grow and shareholders increase in number while directors' stake become proportionally smaller. Limitation of liability, which the corporation typifies, shields the spenders of other people's money from personal liability. Shareholders-in-control therefore freely spend corporate funds knowing that their liability, if any, is limited to the meagre capital they have contributed to the company's equity. It is noteworthy that when, in 1855, limited liability was conceded to corporations, it came with some strings listed above. Over the years, these strings have been jettisoned. The required

¹⁸ Per Denning M.R at p. 1013.

¹⁹ See the epic work: Louis Brandeis, *Other Peoples' Money and How the Bankers Use It*, New York: Cosimo Classics, 1914.

²⁰ Adolf A. Berle, Jr. and Gardiner C. Means, *The Modern Corporation And Private Property*, New York: The Transaction Publishers, 1932.

authorized capital has become whittled down to a mere N10,000.00. This is in spite of the fact that N10,000.00 cannot incorporate a company in Nigeria. In addition, only two persons are required to subscribe to the memorandum at incorporation and there is no longer the requirement that a portion of the capital be paid up. Thus, it is common to have empty-shell companies lacking in meaningful shareholders equity capital. Moreover, Auditors are now appointed by shareholders on the recommendation of directors whose affairs the auditors are to audit. Yet the rule remains that in winding up, shareholders' liability is limited to the amount, if any, unpaid on the shares held by members. I shall be proposing the introduction of a qualified rule on limitation of liability.

In private companies, promoters and founder shareholders are enabled, as it is, to use the corporate form as a garb in their dealings with the public without carrying the full risks of business failure and the burden of creditors' claims. Whilst in public companies, the corporate form of doing business provides an ideal platform for the accumulation of vast resources from numerous individual investors in the form of a joint stock under the superintendence and management of a few directors. Yet, corporate law expects the managers of companies to deliver profits to owners of residual capital. It is in this context that I propose the introduction of a doctrine of Qualified Limitation of Liability, to wit: **that the liability of shareholders for the debts or other liabilities of the company shall, in the first instance, be limited to the amount of capital they have contributed or agreed to contribute to the capital of the company provided always that if corporate assets be insufficient to meet corporate liabilities, all shareholders and members of the board of directors in the immediate three years preceding liquidation shall rateably contribute to all liabilities incurred within the**

period. This may be difficult to apply with regard to quoted companies whose shares are publicly and rapidly traded on stock exchanges. Hence, I further propose that such companies with a capitalisation of N5billion naira and above be excluded. In other words, where a quoted company is capitalised at or above N5billion, the liability of its shareholders should be strictly limited to the amount of capital held or agreed to be contributed to the capital of the company. I am justified in this distinction by the fact that the rank of private companies outnumber those of public quoted companies and it is usually in the ranks of private companies, with little separation between ownership and control, that individual will of controlling shareholders hold sway. The implication of this is that shareholders will bear liability arising from fraudulent trading as well as liability arising from ordinary trading risks. In the latter case, there will be no fault basis for the liability. Whatever critique this may generate, my submission is that it will further engender minority shareholders to be vigilant and active in holding majority shareholders-in-control accountable for the governance of the enterprise and in no distant time, actions seeking redress of directors' breach of duties will multiply.

Financial Malpractices by Corporate Managers

In conceiving directors/managers of companies as corporate monsters, I must first draw a distinction between owner/directors, as in private companies, from directors/managers in public companies. In the former, there is coincidence of interest of owner and manager while in the latter, there is separation of ownership from managerial control. The concept and reality of separation of ownership from control rears its head prominently in public companies with dispersed shareholding structures. There the modern manager holds sway notwithstanding that he may hold little or no equity capital contribution. The problem of accountability posed by this development is

commonly tagged the 'agency problem'²¹ – How to hold corporate managers accountable to owners of residual capital.²² It is in this regard that I make my second proposition that *individuals are naturally selfish and would maximise corporate opportunities, to their individual advantage before the interest of owners of capital. As profit maximisers, in the corporate world, individuals tend to take care of themselves before others.* I do not extend this to the realm of filial relationships where a parent or lover may sacrifice self for off-springs or a beloved, as the case may be. Such altruism is not in the realm of corporate or business transactions. The necessary implication of this second proposition is that corporate directors and managers are naturally disposed to personally profiting from corporate wealth before rendering returns in terms of dividend to owners of residual capital. The ease with which managers approve and dispense corporate funds as administrative expenses is a sure gleaner into this propensity of man. Directors exclusively determine own choice of cars, houses, yachts, aircrafts and other perquisites of office and have the costs written off as operational expenses.

However, corporate law seeks inadequately to hold directors and corporate manages accountable by several regulatory devices. The approach is primordially civil, for it is conceived that private law regulates the relationship between companies and their managers. Firstly, corporate law holds that where corporate property is misappropriated,

²¹ Jensen M, & Meckling W. , "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure; (1976) Journal of Financial Economics, 8.

²² See the debate between Professors Dodd and Berle in: Dodd E.M., "For Whom Are Corporate Managers Trustee?", [1932] Harv. L. Rev. 1145, and Berle, A.A., "For Whom Are Corporate Managers Trustees?: A Note", [1932] Harv. L. Rev. 1365.

it constitutes a wrong done to the company and only the company can seek redress – the famous rule in the case of **Foss v. Harbottle**²³ and the corollary rule that directors by virtue of their office owe duties to their companies and not to the shareholders – the rule in **Percival v. Wright**.²⁴ The concept has been that the corporation, as an entity, is the one to whom duties are owed and shareholders do not own the assets of the company being managed by directors. This hypocritical ostrich position fosters helplessness on shareholders. For, in conception and in practice, shareholders own their companies. Who else is better positioned to monitor the use of corporate assets than shareholders? Instead, corporate law posits that a wrong done to the company can only be redressed by the company. This only shifts the control function from the generality of shareholders to those holding a majority of the company's shares – for the company in the context of addressing wrongs is the majority shareholders who invariably constitute management.

Secondly, corporate law exacts duties from directors as the basis of assessing derogations from corporate goals.

Directors' Duties

In the expression of directors' duties, we find the usual amalgam of common law and equitable concepts. For generally, directors' duties fall into two broad categories: an equitable fiduciary duty to act in utmost good faith always in the best interest of the company; and a common law duty of care, diligence and skill. The Companies and Allied Matters Act attempted to unscramble the vagaries of directors' duties by referring to particular prohibitions of

²³ (1843) 2 Hare 461. Affirmed by the Nigerian Supreme Court in *Omisade v. Akande*, [1987] 2 N.W.L.R. (Pt. 55), 155 at 170.

²⁴ [1902] 2 Ch. 421.

directors' conduct that are considered in breach of their obligations as fiduciaries. The Act in its general expression of directors' fiduciary duties provides in section 279:

- (1) *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 behalf.*
- (2) *A director shall also owe fiduciary relationship with the company in the following circumstances-*
 - (a) *where a director is acting as an agent of a particular shareholder;*
 - (b) *where even though he is not an agent of any shareholder, such a shareholder or other person is dealing with the company's securities.*
- (3) *A director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business and promote the purposes for which it was formed and in such manner as a faithful, diligent, careful and ordinarily skillful director would act in the circumstance.*
- (4) *The matters to which the director is to have regard in the performance of his functions include the interests of the company's employees in general as well as the interest of its members.*

Thereafter, the Act in several other subsections of sections 279, 280, 281, 283 and 284 addressed elements of this general expression of fiduciary duties. The extent to which these prescriptions hold directors accountable will be demonstrated by reference to the rules on directors' shirking; secret profits; conflict of interests; remuneration of directors; and loans to directors. In addition, the effectiveness of existing rules on directors' fraudulent dealings in company securities, will be questioned.

a. Duty of Skill and Diligence: Directors' Shirking

At common law, a director must exercise skill and diligence in the discharge of his duties. The propensity or inclination of directors to derogate from these duties is commonly referred to as directors' shirking. When directors shirk in the performance of their duties to the company, they become monsters to shareholders' interest. The courts have striven to determine the degree of skill and diligence required of directors. Romer J., in *Re City Equitable Fire Insurance Co.*,²⁵ formulated a three prong rule on directors' duty of care and skill; (1) that a director need not exhibit in the performance of his duties, a greater degree of skill than may reasonably be expected of a person of his knowledge and experience and he is not liable for mere errors of judgment; (2) that a director is not bound to give continuous attention to the affairs of the company. His duties are of an intermittent nature to be performed at periodic board meetings; (3) that in the absence of suspicious circumstance, a director may delegate to other officials, duties which may be properly delegated. Under the first test, what "may reasonably be expected of a person of his knowledge and experience" enthrones a subjective test, so that you do not expect more than the output of the quality of knowledge and

²⁵ [1920] 1 Ch 407 at 427 – 430.

experience of a director. Directors under the test, need not aspire to give more than their present knowledge and experience. This was followed in **Lagunas Nitrate Co. v. Lagunas Syndicate**,²⁶ where the English Court of Appeal stated that:

*If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company.*²⁷

The above standard has been found inadequate in that many areas of business require specialised skills and knowledge beyond those possessed by laymen. It is no use appointing persons to the board that do not have the requisite skills to move the company to profitability. A director upon accepting to serve should be obliged to live up to a certain degree of service performance. A director should not be able to rely on his lack of knowledge or expertise to avoid liability.

The CAMA in response to this criticism provides in its section 282 that every director 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'*. This enthrones a dual (subjective/objective) test. The first arm of the provision alludes to

²⁶ (1899) 2 Ch. 392.

²⁷ Per Lord Lindley MR, at page 435; See also *Re Brazilian Rubber Plantations & Estates Ltd.*, [1911] 1 Ch 425; *Bishopgate Investment Mgt Ltd v. Maxwell (No.2)*, [1999] BCLC 1282.

directors' fiduciary duties generally while the second arm embodies a reformulation of the common law duty of care and skill. The duty of care now requires a director to exercise the care, diligence and skill that would be exercised by a reasonable person in the same circumstance having both (a) the knowledge and experience that may reasonably be expected of a person in the same position as the director and (b) the director's knowledge and experience. Thus, in making business decisions, directors should inform themselves of any material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties. Thus, to satisfy the duty of care, directors must be informed, make a reasonable effort to become familiar with the relevant and available facts and act with due care when making decisions. It is noteworthy that the duty of care is that of a reasonably prudent director. The test is a dual objective/subjective one and not solely subjective. Every director is now duty bound to upgrade himself to deliver that objective standard of care and skill reasonably expected from a director of his company. A director who chooses to be indolent or unconcerned about company business is not excused by the fact that he was not part of the decision making process which resulted in adverse economic consequences. To this extent, the decision in **Re City Equitable Fire Insurance Co** is overruled.²⁸

Generally, where a director is in breach of any of the duties required of him by virtue of his position as director, one or more of several remedies may be available against him. These include a declaration of rights; an injunction to restrain or prohibit further action; damages or

²⁸ See *Olawepo v. SEC* [2011] LPELR, 3598 (CA); *Odutola Holdings v. Ladejobi* [2006] 12 NWLR (Pt.994), 321 (SC).

compensation; rescission; restoration of the company's property, if traceable; dismissal; or accounts of profits. In addition, where the CAMA expressly so provides, a director may be liable for breach of duty for non-compliance with the provisions of the Act. An action for negligence may also lie for breach of the duty of care and skill. For this purpose, directors are individually accountable for board decisions.²⁹

b. Directors' Secret Profits

A central theme of the fiduciary relationship between directors and their companies is that they must not make secret profits.³⁰ When directors engage in making secret profits, again they monstrously rob the company of corporate funds and thereby rob shareholders of returns on investments. Secret profits cover not only payment in the nature of bribes but also any benefit which they would not have derived but for some use of their special position as directors. If they acquired any secret profits in their position as directors, they must account for it to the company even though they acquired the benefit honestly and in good faith. The rule against secret profits is rigorously applied as exemplified in *Regal Hasting Ltd v. Gulliver*.³¹ There, company A owned a cinema and the directors decided to acquire two other cinemas with a view to selling the company's entire undertaking as a going concern. To this end, company A formed a subsidiary, company B to take a lease of the other two cinemas. The Landlord required a guarantee of the rent by company A's directors unless B's paid up capital was £5,000. The original proposition of company A's directors was that B should be a wholly-owned subsidiary but since A was unable to provide more than £2,000, and since the directors did not wish to give a

²⁹ Section 282(3).

³⁰ Section 280(2).

³¹ [1942] 1 All ER 378; [1967] 2 A.C 134.

guarantee, the original plan was changed. It was agreed at a board meeting of companies A and B that all of company B's share capital of 5,000 shares of £1 each, should be issued at par, 2,000 shares to company A and 3,000 to its directors. The lease of the cinemas was then granted to company B. The plan to sell the undertaking as a going concern eventually failed. A financial group thereafter bought from individual shareholders all the shares in companies A and B as a result of which the directors made a profit of £2,16.1p on each of the shares in company B. In an action by company A, now in the control of the financial group, the House of Lords held that the former directors of company A must account to it for the profit which they made on the shares in company B, for they acquired those shares by reason of their being directors of company A. It was immaterial that they acted in good faith and saw no way of raising the money except from themselves, for their liability depended not upon breach of duty of care but upon the rule that a director must not make a secret profit out of property acquired by reason of his relationship to the company of which he is director.

It seems to follow from **Regal's Case** that an altruistic intent will be no defence. Lord Russell of Killowen stated the principle thus in **Phipps v. Boardman**:³²

The rule of equity which insist on those, who by the use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted

³² [1967] 2 A.C 461.

as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

c. Directors' Conflict of Interest

The personal interest of a director shall not conflict with any of his duties as director.³³ For when they conflict, the director becomes a monster ready to prey on the interest of the company and its shareholders. In ***Cranleigh Precision Eng. Ltd v. Bryant***,³⁴ B acquired valuable technical information as P's Managing Director. He, subsequently, sought to use this information for his own benefit and that of a company formed by him. An injunction was granted restraining B and the company from breach of confidence. Directors are not allowed either during or after the determination of their service with the company to use for their own benefit anything, property, trade secrets or confidential information entrusted to them for the use of the company. It is an essential incident of fiduciary relationship that persons in such relationship should not place themselves in a position in which their duty and personal interest conflict. This principle is commonly applied to contracts between the directors and their company. Unless such a contract is sanctioned by the article or by the members in general meeting, it is voidable by the company. An old illustrative case is ***Aberdeen Rly v. Blaike***,³⁵ a contract between a company and a partnership of which one of the directors was a partner was held voidable at the company's instance although its terms were

³³ Section 280(1).

³⁴ [1964] 2 All ER 289.

³⁵ (1854) 2 EQ. 1281.

quite fair. Lord Cranworth captured this principle succinctly:³⁶

A corporate body can only act by agents and it is, of course, the duty of these agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such agent have duties to discharge of a fiduciary nature toward their principal and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagement in which he has or can have a personal interest conflicting or which possibly may conflict with the interest of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

Companies' articles usually permit contracts between directors and their company but these are subject to section 277 of the CAMA which provides that it is the duty of every director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company, to declare the nature of his interest at a meeting of the directors of the company.³⁷ In its subsection (3), a general notice by a director that he is a member of a specified company or firm and is to be regarded as interested in any contract which may subsequently be made with that company, is a sufficient declaration of interest in relation to any contract so made. A director who fails to comply with section 277 is liable to a fine of N100. Non-compliance merely renders the contract voidable at the company's instance and not void. The director is also accountable for any secret profit made. If it is also too late

³⁶ At p.492.

³⁷ Section 277(1).

for the company to avoid the contract as when *restitutio in integrum* is no longer possible, the director can enforce the contract against the company. Disclosure under section 277 must be made to the board of directors. It is apparent that this prohibition can be more readily observed in breach. A sanction of a fine of N100 for breach clearly has no deterrent effect.

My Vice-Chancellor, Sir, in a 2011 article published in the International Company and Commercial Law Review, titled **“Directors Duties and the Frontiers of Corporate Governance”**, I had chronicled how the foregoing regime inevitably produces a weak corporate governance framework. The ineffectiveness of this regime of duties is underscored by the rule that it is only the company that can seek redress, that is, the majority in control as directors/managers. It is my submission that the rule in ***Percival v. Wright*** is archaic and anachronistic. Shareholders generally, minorities inclusive, should be able to seek redress for corporate wrongs. The argument that this will lead to frivolous actions that may bog down management can simply be addressed by procedural rules designed to weed off frivolities. In the same vein, I hear the death knell of the Rule in ***Foss v. Harbottle***. I shall come back to this shortly.

d. Remuneration of Directors

Directors are statutorily entitled to remuneration, which is commonly fixed on the recommendation of the Board of Directors and accrues from day to day while the appointment lasts. This readily presents a monstrous avenue for the frittering of company capital into the private accounts of directors. The *quantum* of remuneration is to be determined by the company in general meeting.³⁸ The

³⁸ Section 267(1).

directors may also be entitled to travelling, hotel and other out-of-pocket expenses properly incurred by them in attending and returning from meetings of the directors or of any committee of the directors or general meetings of the company or in connection with the business of the company.³⁹ Articles would usually provide for payment of remuneration to directors. Under such articles, members may fix the remuneration of directors and, if approved, the remuneration becomes a debt due and owing by the company and is payable out of capital and not only out of profit. A director may also prove in the winding up for his remuneration like an ordinary creditor but he is not entitled to the preferential payment accorded to servants of the company. The articles constitute a contract between the directors as such and the company so that a director has a contractual claim to any fixed remuneration in the articles.⁴⁰

The classical formulation of directors' remuneration under English law is captured in section 267(1) & (2) of the Nigerian Companies and Allied Matters Act, which states:

- (1) *The remuneration of the directors shall from time to time be determined by the company in general meeting and such remuneration shall be deemed to accrue from day to day.*
- (2) *The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.*

³⁹ See section 267(2).

⁴⁰ See Section 44 CAMA; See Also *Elley v. Positive Insurance Co.*, (1876) 1 Ex. D. 88; *Ex. Parte Beckwith*, [1898] 1 Ch 324.

These provisions are highly unsatisfactory and have been the subject of great abuse, a source from which corporate directors and managers fritter away capital into personal havens.

My Vice-Chancellor, Sir, in a 2011 article titled **“Monitoring Directors’ Remuneration, Fat Cat Packages and Perks of Office”** and published in the *Journal of Financial Crime*,⁴¹ I examined how the extant rules on directors’ remuneration are exploited by corporate managers to fester their nests. Where there is a combination of concentrated and dispersed ownership as exists in some Nigerian companies, it is not certain that the members in general meeting will be able to have an effective say in the amount of remuneration that is to be paid to directors. Resolutions to approve directors’ remuneration, like most resolutions, are carried by a majority vote, strengthened by the voting rights of directors with substantial shareholding. Where directors’ shareholding are nominal, time spent at general meetings is hardly adequate to permit a detailed analytical consideration of remuneration proposals. Often the requisite information for such analysis is not available to shareholders. With regard to the managing director, the power conferred on the board to determine his remuneration does not offer any effective monitoring. It is questionable whether the board of directors will be bold enough to question any exorbitant remuneration being paid to the managing director, especially where the managing director is a major shareholder and has a hand in the appointment of the other directors to the board. Even where the managing director is a nominal

⁴¹ (2011) Issue 19:1 *Journal of Financial Crime* (Sweet & Maxwell, Lond.).

shareholder, the Chief Executive Officer still wields a lot of influence in delivering directors' perks and other perquisites of office, and being in his good books is a suave thing to plot.

Another unregulated aspect of remuneration relates to what is often referred to as "golden handshake" or "golden parachute" packages. It refers to the practice of the board giving a departing managing director payments and benefits that are gratuitous, not required under the terms of an executive director's compensation contract. Such golden handshakes are common even when executives perform so poorly that their boards feel compelled to replace them. Such "soft landing" provisions provide executives with insurance against being fired due to poor performance. Traditionally, English corporate law addresses this issue by applying the *ultra vires* rule⁴² to gratuitous payments. Gratuitous payments are treated as *ultra vires*,⁴³ unless such payments are reasonably incidental to the carrying on of the company's business; are bona fide transactions; and are made for the benefit and to promote the prosperity of the company. Changes in the United Kingdom and Nigeria to the *ultra vires* rule effectively tolerates *ultra vires* transactions as they are no longer completely null and void,⁴⁴ thus opening the door to manipulative gratuitous payments as golden parachutes. These fat-cat remuneration packages generally pose two problems. First they increase agency costs and thus

⁴² See *Ashbury Rly Carriage Co. Ltd v. Riche*, (1875), L.R 7 H.L. 653. At common law, an *ultra vires* transaction was null and void and of no effect. Even a unanimous resolution of members assenting to the transaction could not cure the defect.

⁴³ See the cases of *Re Lee Behrens & Co. Ltd.*, [1932] 2 Ch.D 46; *Parke v. Daily News Ltd.*, [1962] 2 All E.R 929; Ch. 927; *Hutton v. West Cork Rly Co.*, (1883) 23 Ch.D 654.

⁴⁴ See section 39(4) of the CAMA.

reduce the profit margin available to residual owners. Secondly, they unduly enrich directors and corporate managers, as very often these packages are not tied to performance indicators. The approach of law reformers has been to provide for ample disclosure of information in the process of fixing and approving directors' remuneration. Whilst it is the responsibility of the board to propose remuneration packages, such proposals are hardly buttressed by relevant information such as performance record of the directors, an inflation-linked index of remuneration packages and comparative remuneration systems in the industry. A further barrier to shareholders using good information is the cost of processing it, especially to a small shareholder. With these handicaps, directors' remuneration is not effectively regulated and monitored.

Furthermore, existing rules on director's remuneration do not adequately address all aspects of fat cat packages. Such packages consist of essentially three components – the annual remuneration itself, comprising cash and bonus payments, often expressed in a contract and amenable to disclosure to members in general meeting; severance pay, which in some cases may include an annuity to the director or his spouse for life; and perquisites of office. The latter category comprises the choice of housing for directors, guest houses, choice of transportation vehicles which may include exotic cars, yachts and aircraft (helicopters and jets). Also included in this category are the frequency and costs of business trips, hotel bills and associated costs. It is not unheard of for the rent and house-keeping expense of a director's mistress being consistently written off as part of administrative expense. This aspect of directors' remuneration is covered by section 267(2) which provides that "The directors may also be paid all travelling, hotel

and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company." In one case, it was said that part of the funeral expenses of a director's deceased parent was thus treated as part of the costs of organizing a conference. These and many other types are routinely written off as expenses by accountants and auditors and never come before the members in any recognisable form in general meetings. Yet, they pose the same two prong problem of fat cat packages – they increase agency costs and unduly enrich directors. Often, it is the life style engendered by these perquisites that appeal to directors and the quest to perpetuate themselves in office.

It is in the foregoing context that I recommend a more detailed statutory provision through an amendment of the CAMA to, inter alia, place a cap on directors' remuneration calculated by a referenced index to gross output or profit before tax of the preceding accounting year. A similar cap should also be prescribed on increases in directors' remuneration.

e. Loans to Directors

By section 270 of the CAMA, it is unlawful for a company to grant a loan to its director or a director of its holding company or to provide security for a loan made to such person. This is a rule of maintenance of capital. Loans to directors have the potential of undermining capital and returns to shareholders. It readily creates a conflict of interest situation giving rise to liabilities for breach of fiduciary duties. The prohibition does not draw any distinction between loans to executive and non-executive directors. Executive directors in addition to statutory obligations as directors, also work under contracts of

employment with the company.⁴⁵ Under such employment contracts, loans such as those for cars, housing, furniture and other employment benefits may be granted in advance. These are not affected by section 270 as the root of such facilities is in employment law by virtue of their employment contracts and not in their capacity as directors *simpliciter*. The prohibitions fall short of outlawing loans granted to filial or kindred relations of directors or their associates. For, it is in this latter category that great abuse exists. Loans to relations and associates are arbitrarily granted and in many cases without risk assessment or perfection of securities. Section 270, instead, provides a number of exceptions to the prohibitions that further provide elasticity in the exercise of directors' discretion to grant loans. First, loans may be granted to a director where the company, being a subsidiary company, the director is a nominee of its holding company or to provide funds to enable a director meet expenditures incurred for purposes of the company or to enable him to perform his duties properly. Second, where the ordinary business of the company includes the lending of money or giving of guarantees for loans made by other persons, a loan is permissible provided it must first be approved by the company in general meeting or a condition imposed that if it is not approved at, or before the next annual general meeting, the loan must be repaid or discharged within six months from the conclusion of the meeting.⁴⁶ These further exceptions thus expand the scope for abuse. Within the ranks of financial institutions, loans granted to directors, their relations, associated companies and affiliates are perennial sources of bad debts that translate into loss of capital or profits by shareholders.

⁴⁵ See *Longe v. First Bank of Nigeria Plc* [2010] 6 NWLR (Pt.1189),1(S.C).

⁴⁶ Section 270(2).

f. Directors' Fraudulent Trading and Manipulations of Securities Market

In the realm of public companies, dealings in securities offer a veritable ground for corporate directors/ managers to profit at the expense of investors and other third parties.

From the humble beginnings of the modern corporation as joint stock trading undertakings, the law has grappled with the tendency of promoters and directors to manipulate dealings in shares for selfish gain. The manipulations occur at the point of raising public equity capital as well as trading in secondary securities. The basic approach of law reformers is anchored on the philosophy of disclosure. The law exacts disclosure requirements for the compliance of companies, directors and other officers. The basic assumption is that the behaviour of company promoters and conduct of company affairs can be influenced merely by requiring disclosure of activities, without necessarily the need for negative prohibition or positive regulation. Initially, disclosure obligations were centred around financial statements in public issue documents as well as annual accounts. Sections 67 and 71 of the Investment and Securities Act 2007 restricts public issues to public companies and any form of application for the shares of a public company must be accompanied by a prospectus – a disclosure manual. Subsequently, companies were required to supply information which are more of public interest, though such information are still relevant to investors. The varying degree of disclosure requirements can be seen as reflecting more clearly, perhaps more than anywhere else in company law, the recognition of new interests, besides those of investors, in the way companies operate. Modern legislation has been aimed at safeguarding the market for investment capital and this

is concerned with disclosure on public issues of securities, continuing disclosure and the prevention of fraudulent market practices.

The emergence of an active market in the securities of publicly quoted companies has exacerbated the need to maintain levels of integrity in securities transactions. Whilst the statutory disclosure regime centres around the prospectus, dealings in the secondary market are hardly protected from abuses by company directors, officers and other parties. The modern stock exchange provides a framework for securities transactions of great financial magnitude. Fraud, misleading information or illegalities in such a market has systemic consequences for the entire financial system. Maintaining integrity in securities transaction thus underscores the advent of statutory protection to investors and other market participants.

Notwithstanding a characteristic uneven distribution of information in the securities market, it has been found reprehensible for a party to interfere fraudulently, misleadingly or otherwise manipulate the investment decisions of participants. This is often done by tempering with information or misleading others by words or actions to make investment decisions that they would not have done if they had the right information. Insider dealing, false trading, price manipulations, dissemination of misleading or illegal information are all species of reprehensible interference with the normal workings of the securities markets, otherwise referred to as capital market abuses.

The conducts that may constitute capital market abuse are not closed. Indeed, a bid to categorise or define the nature of such acts will always be found incomplete as new categories of 'sins' are developed by ingenious but

devious minds in the operations of the market. Part XI of the ISA specifically identifies the following acts for prohibition:

- a. False trading and market rigging Transactions;⁴⁷
- b. Securities market Manipulations;⁴⁸
- c. False or Misleading Statements;⁴⁹
- d. Fraudulently inducing persons to deal in Securities;⁵⁰
- e. Dissemination of Illegal Information;⁵¹
- f. Employing or Engaging Fraudulent means for the Trade in Securities;⁵²
- g. Insider Dealing;⁵³
- h. Abuse of Information obtained in official Capacity.⁵⁴

My Vice-Chancellor, Sir, in my book, **Company Securities: Law and Practice**, which is now in its second edition, I fully examined the ambit of these various species of fraud by corporate actors. Fraudulent directors are on the prowl, manipulating share prices for gain. They are the monsters of the securities markets. Their activities distort the market for company securities, as share prices hardly reflect the true value of the securities.

The rules of the Stock Exchange designed to ensure adequate and timely disclosure of corporate information lack statutory force and expedient judicial enforcement mechanisms. A ready solution of ensuring a level playing ground is to statutorily prohibit company officers and

⁴⁷ Section 105.

⁴⁸ Section 106.

⁴⁹ Section 107.

⁵⁰ Section 108.

⁵¹ Section 109.

⁵² Section 110.

⁵³ Section 111.

⁵⁴ Section 112.

closely connected persons from dealing in the securities of the company. But to allow officers and directors of companies to own and deal in their company's shares may be a desirable policy which will reward past performance, promote industrial democracy and peace, as well as be an incentive to increased productivity and future profitability. What is objectionable is when these insider directors/managers trade on information that is confidential or that is not available to the general public, such as advance knowledge about a new product or unanticipated profits or losses.⁵⁵

It was therefore logical to address the issue of insider trading statutorily in the company law reform of the 1990s. Chapter 5 Part XVII of the Companies and Allied Matters Act 1990 was devoted to insider trading regulation.⁵⁶ This part of the CAMA was repealed and re-enacted substantially in Part X of the Investments and Securities Act 2007. In my article, **The Statutory War on Insiders**, published in the *Commercial and a Industrial Law Review* in 2002, I examined the extant regulations and submitted that an effective legislation on the subject must provide some substantial redress for persons who may suffer loss as a result of the activities of insider dealers. Section 117 of the ISA criminalizes insider dealings and capital market manipulations with a term of imprisonment for 2 years or a fine of N1,000,000 or both.⁵⁷ This is a bold step which effectively makes insider dealing a crime. The decision to make the practice a crime in Nigeria as well as legislate harsh penalties is commendable but there is need to arm the law

⁵⁵ See Regulation 7(2) of the Securities and Exchange Commission Regulations.

⁵⁶ The Legislature was only following a trend which had taken root internationally. See Franklin Gevurtz, "The Globalisation of Insider Trading Prohibitions" (2002) 15 *Transnat'l Law* 63.

⁵⁷ Section 117.

enforcement and regulatory authorities with sophisticated instruments for crime detection, investigation and prosecution. As a practical matter, criminal sanctions may fail to meet their goals of deterrence and just punishment if offenders are not readily detected and apprehended for prosecution and punishment.

The first insurmountable problem that enforcement officials face is the difficulty in meeting the burden of proof for a criminal case and its critical point of demonstrating the link between the trader and the information. Virtually the only way of proving this is to have the testimony of a person who is intimately involved in the scheme. This testimony is hardly available. Evidence readily available in insider cases are often mainly circumstantial. In the absence of direct evidence, it is difficult to enforce the criminal sanctions, with the result that the sanctions have little, if any, deterrent effect. In order to have effective statutes, they must be enforceable. If in many cases criminal sanctions are unenforceable then the potential insider trader will have little reason to refrain from committing the crime no matter how harsh the penalty. It may also be necessary in this regard to adopt an accusatorial procedure in insider cases where the primary duty will be on the prosecution to simply make a *prima facie* case, thereupon the burden of proof shifts to the accused to prove his innocence. A whistle blowing provision that provides some reward or recoveries accruable to financial intermediaries for detection and prosecution of insider dealings would provide incentive for the detection and prosecution of insiders. Often, regulators are hardly aware of the perpetration of the crime as the *modus operandi* is usually complicated, secretive and sophisticated in execution.

Additionally, the method by which officials administer

criminal justice in the securities markets helps to create enforcement problems. In Nigeria, the bodies that monitor the market are separate from those that actually prosecute the criminals. While the SEC monitors the market, actual prosecution is the constitutional responsibility of the Attorney General's office. When the goals of the two bodies diverge, problems arise. Enforcement problems would quickly arise if the Ministry of Justice has priorities other than prosecution of insider dealings. This scenario is easily conceivable. The Ministry of Justice is responsible for enforcement of all federal statutes, not just the securities laws. In a time of competition for scarce fiscal resources, the Justice Ministry might decide to emphasize the active enforcement of one set of statutes at the expense of the securities laws.

As it is, the statutory provisions stand on their own without any grand administrative infrastructure for detecting, prosecuting and punishing insider dealers. The law enforcement system needs to concentrate more on economic penalties in order to police insider trading effectively. This would obviously eliminate the problem presented by the criminal burden of proof. The primary economic penalty available to the enforcement officials ought to be fines. If the legislators believe that insider trading is an economic crime, then an economic penalty seems to be the most effective means of policing the activity. Insider trading prohibitions will also be more effective in a system which compensates the injured party. By this token, the guilty party is made to regurgitate his gains and thus purge his conscience with regard to the dishonest behaviour. Since the financial gains of insider trading can be enormous, it may be convenient for an insider to pay some paltry fine or serve a few years imprisonment and thereafter be free to enjoy the gains of

his dishonesty and iniquity. By section 116 of the ISA, the insider is to compensate the aggrieved person for any direct loss suffered while he is also accountable to the company for the direct benefit or advantage received as a result of the offensive transaction. This thus compels an insider to render compensation to an aggrieved party as well as the company whose securities are concerned.

How Else Do We Hold Directors Accountable to Shareholders?

The deficiency of the foregoing legal framework in checking directors and corporate managers has long been recognised. It will be sufficient to discuss some major attempts at augmenting the rules.

A. The Use of Auditors as External Gate Keepers

It is with a view to checking directors and managers' abuses of corporate funds that it is provided in the Companies Acts that every company appoint an auditor or auditors to audit the financial statements of the company. The Companies Act, 1855 introduced the use of auditors who are to be appointed not by shareholders but by the Board of Trade. It has been a feature of English Companies Acts since then except that its effectiveness has increasingly been whittled down. Auditors are currently appointed by shareholders at each annual general meeting and hold office from the conclusion of one general meeting to the next.⁵⁸ At the end of the financial year, section 359 of the CAMA requires that an auditor's report should be attached to the Balance Sheet and it should state whether, in the opinion of the auditors, the Financial Statements comply with the Companies and Allied Matters Act and give a true and fair view of the state of the company's affairs at the Balance

⁵⁸ Section 357(1) CAMA.

Sheet date and of its profit and loss account for the year ended on that date.

It is the duty of the company's auditors, in preparing their report, to carry out such investigations as may enable them to form an opinion as to whether proper accounting records have been kept by the company and proper returns adequate for their audit have been received for the purpose of the audit.⁵⁹ In the discharge of this function, procedures and standards prescribed by the Institute of Chartered Accountants of Nigeria as well as the Financial Reporting Council are to be followed.

The classic common law statement of auditor's duties was made by Lopes L.J. in ***Re Kingston Cotton Mill***, thus:⁶⁰

An auditor is not bound to be a detective, or ... to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watchdog not a blood hound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care.

The standard required of auditors was, the judge said, to perform the audits with the standard of skill, care and caution that a reasonably competent, careful and cautious auditor would use. Determining what that standard was depended on the facts of the case. The more vexed question has always been "to whom do

⁵⁹ Section 360 CAMA.

⁶⁰ (1896), 2 Ch 279, 288-289; See also *Re Thomas Gerrard & Sons Ltd*, [1967] 2 All ER 525.

auditors owe these duties?"

Auditors are fiduciaries and may be liable to the company for negligent discharge of their duties. Section 368 of CAMA provides for the auditor's liability in negligence where a company suffers loss or damage as a result of the failure of the auditor to discharge his duty. He shall be liable for negligence in an action by the directors. If the directors fail to institute an action against the auditor, any member may do so after the expiration of thirty (30) days' notice to the company of his/her intention to do so.⁶¹ Although in the normal case, the auditors must only exercise an ordinary degree of care and skill and are, for example, entitled to accept statements on key matters from the company itself,⁶² the picture changes once there is any cause for suspicion; then the auditor is placed under a positive duty to inquire and investigate and may be held liable to anyone affected by his actions. In **Re Thomas Gerrard & Sons**,⁶³ auditors were held liable for their failure to investigate further and detect the fraudulent dealing which laid behind their discovery of altered invoices. This was a breach of their duty of care and skill as owed to the company.

Auditors may incur liability to third parties in a number of ways. Of most relevance is liability in tort for negligent mis-statement. My Vice-Chancellor, Sir, it is my intention to explore the extent of such liability with a view to exposing how ineffective the audit function can be in protecting corporate assets in the hands of fraudulent directors and managers. It is contended that a strict

⁶¹ Subsection (3).

⁶² See *Re City Equitable Fire Insurance Co. Ltd.*, [1925] 1 Ch. 407.

⁶³ [1968] Ch. 455. See also *Formento (Sterling Area) Ltd v Selsdon Fountain Pen Co. Ltd.*, [1958] 1 WLR 45.

regime of liability will engender a better delivery of the audit function while a permissive regime of liability will make the audit role merely perfunctory.

The *locus classicus* on liability to third parties for negligent misstatements is ***Hedley Byrne and Co. Ltd. v. Heller & Partners Ltd.***⁶⁴ It held that liability for negligent misstatement occurs where a person possessing certain skills or knowledge makes a statement to another whom he knows (or ought to know) will rely on it for a given purpose, and that other person does in fact rely on it to his detriment. Such liability is not limited to cases where there is an existing contractual or fiduciary relationship. Such a duty will arise where a person gives information or advice in such circumstances that a reasonable man in his position would know that his skill and judgment was being relied upon, unless he expressly disclaims responsibility for its accuracy, and the auditor is clearly a person who may fall within this category.

Liability may also be predicated on a combination of both a breach of duty and negligent misstatement. The court held that:

... it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful

⁶⁴ [1964] A.C. 465.

*inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.*⁶⁵

This decision enthroned a three-way test for liability:

- (a) foreseeability: whether there is foreseeability on the maker's part of economic loss arising from the lack of due care;
- (b) proximity: whether the negligent misstatement is made in the situation in which there was a close and direct relationship between the maker and recipient of the statement and where the recipient is known or ought to be known to the maker as a person or a member of a limited class of persons who are likely to rely on the statement;
- (c) fair, just and reasonable: whether taking all the circumstances into account the imposition of a liability for economic loss flowing from misstatement would be fair, just and reasonable.

The application of these principles to accountants and the audit function is demonstrated by the case of ***J.E.B. Fasteners Ltd. v. Marks, Bloom & Co.***⁶⁶ A firm of accountants produced a set of audited accounts for a company which featured an over-inflated estimate of the value of the company's stock, and which in consequence gave an entirely misleading picture of the company's financial health. This was against the background, known to the defendant firm, of a likely take-over of the ailing firm, possibly by the plaintiffs. In due course, the

⁶⁵ Per Lord Morris of Borth-y-gest.

⁶⁶ [1983] 1 All E.R. 583.

accounts were made available to the plaintiffs, who then took over the company. This venture was unsuccessful and they sought compensation from the accountants, on the grounds that their auditing was carried out negligently and that they owed a duty of care to all persons who might be foreseeably affected by such negligent work. At first instance, in a comprehensive judgment, Woolf J. held⁶⁷ that a duty of care would be owed by the defendants if they "reasonably should have foreseen at the time the accounts were audited that a person might rely on those accounts for the purpose of deciding whether or not to take over the company and, therefore, could suffer loss if the accounts were inaccurate." In the circumstances of financial exigency, it was likely that outsiders would be relying on the accounts since outside financial support was likely to be needed and, indeed, the plaintiffs had relied on the accounts in making their calculations. However, Woolf J. finally concluded that the plaintiffs would ultimately have taken over the company in any event and, therefore, their negligence claim failed due to their inability to show a causal link between the negligence of the accountants and the losses they, subsequently, suffered. The Court of Appeal, upheld the decision. The underlying reasoning of the trial judge was unanimously upheld, the Court of Appeal agreeing that the negligently prepared accounts did not to any material degree affect the judgment of the plaintiffs when they made their takeover decision. Implicitly, if there has been a causal link, the claim would have been successful.

A possible deduction from the ***J.E.B. case*** must therefore be that any ordinary investor who (wholly or partly) relies on audited accounts in reaching an investment decision will be able to sue the auditor if his work was performed

⁶⁷ [1981] 3 All E.R. 289, at 296.

negligently and the investor suffers loss. It is not unreasonable for the investor to rely on this independent analysis of the company's financial condition, and it is unlikely that the auditor could deny that he could foresee such an investor relying on his accounts. The issue was laid to rest in the decision of the English House of Lords in **Caparo Industries Plc v. Dickman**.⁶⁸ In that case, the House of Lords held that directors in preparing financial statements and auditors in auditing the accounts owe no general duty of care to potential shareholders or to the public at large to ensure that the accounts are accurate, save where there is sufficient proximity to create a duty of care to a particular third party. This is a leading English authority from its apex court on the issue with binding effect on lower courts. Whilst Nigerian courts are yet to pronounce on the basis of auditors' liability in Nigeria, the **Caparo** case will certainly be a primary persuasive precedent to be cited.⁶⁹

My Vice-Chancellor, Sir, in an article titled "**Re-Examining the Role of Auditors and Audit Committees: Nigeria and the UK in Perspective**" published in the March, 2013 issue of the International Journal of Disclosure and Governance,⁷⁰ I have examined the legal frame-work delineating auditors' responsibilities and potential liabilities in the United Kingdom and under the Nigerian CAMA and prescribed an approach that will ensure effective compliance and discharge of responsibilities owed to all persons who may conceivably rely on Financial Statements and the auditors' certification of accuracy. I advocate a stricter

⁶⁸ [1990] 1 All ER 568.

⁶⁹ Other common jurisdictions that have followed the English direction include Australia and New Zealand.

⁷⁰ (2013) International Journal of Disclosure and Governance, p.1-24. (Rutgers Business School, University of Newark, NJ).

regime of civil liability for auditors in meeting increasing challenges posed by several audit failures and scandals world-wide. I submit that existing statutory framework for auditors' liability need to be supplemented and advanced by common law formulations. A legal regime that absolves auditors of liability for a careless audit, unless it so happens that the company itself suffers loss, is absurd. It is my submission that in reality, a company's annual report containing the financial statements of a company's performance as audited, forms the bedrock of informed investment decisions by existing shareholders and prospective investors: For existing shareholders, it provides an analytical basis for the evaluation of the company and thereby influences the decision to sell or hold or even to make further purchases of the company's stock; and for investment analysts, advisers and investors, it encompasses the most readily obtainable certified performance record of the company. It is only reasonable, therefore, that it will be relied upon by professional advisers in investment decisions. To affirm this duty of care to all will engender a great sense of responsibility by auditors in the performance of their statutory duties. This will stem the tide of corporate failures attributable to delinquent audits. The Nigerian courts are enjoined to chart a course different from the English by attaching liability to company auditors in the discharge of their statutory duty.

B. The Use of International Accounting Standards

Financial failures resulting in losses of investor and creditor's funds invariably have issues of failed accounting and auditing functions. The ordinarily reasonable investor does not understand how a company recently audited and certified by its accountants suddenly becomes a bubble. Corporate failures erode investors' confidence and impacts negatively on the accounting

profession. I submit that in Nigeria, following several bank failures, the accounting profession has lost its integrity in the consideration of the investing public. This readily begs the question: What is the prevailing accounting standard and how does it permit the infractions that resulted in corporate failures?

In Nigeria, the development of accounting and accounting standards could be traced to the then Association of Accountants of Nigeria - AAN (now ICAN). The body was formed to regulate accountancy profession in the country. History suggests that ICAN was responsible for the formation of the Nigerian Accounting Standard Board (NASB) before it was taken over by government, in 1985.

The Nigerian Accounting Standards Board Act, No. 22, 2003 was statutorily charged with the prescription of accounting standards for practitioners. In 2011, it was repealed and the Financial Reporting Council of Nigeria Act 2011 was enacted. The latter enactment was to launch Nigeria into a globally acceptable standard. It was to address the institutional weaknesses in the regulation, compliance and enforcement of standards. The Council adopted the international standards issued by the International Accounting Standards Board (IASB) in London, U.K – a single set of globally accepted high quality accounting standard. The standards uphold the global tenets of corporate transparency and accountability in the accounting processes of companies, particularly concerning anti-corruption.

The penalties for non-application of the requirements of the standards is contained in sections 23 and 24 in Part V of the Act. For instance, section 23 (1) states that any person who fails to comply with the prescribed statement of accounting standards in the preparation of a financial

statement commits an offence and shall be liable on conviction to a fine of five million naira (N5,000,000.00) or imprisonment for a term not exceeding 1 year or both, provided that the Board brings such non-application to the notice of the preparer of such financial statement and the preparer fails to withdraw and amend the financial statement within 60 days from the date of the notice.

Regrettably, Premium Times newspaper, in its February 19th issue, 2015 laments that more than 40 per cent of all public companies in the country's capital market are yet to migrate to the International Financial Reporting Standards in their operations. This calls for serious concern as it demonstrates the reluctance of corporate managers to surrender their accounting responsibilities to international best practice standards. The accounting profession needs to redeem its integrity as gatekeepers in checking the financial excesses of directors and managers of companies.

C. Enforceability of Corporate Governance Codes

The inadequacy and ineffectiveness of classical corporate governance rules, which revolve around directors' duties, as discussed above, have given vent to a new regime of corporate governance rules. In some jurisdictions, the approach lie in codification of directors duties whilst in others practical rules of directors' conduct or codes of best practice are set albeit in non-statutory form by government agencies or self-regulatory organisations. Legal duties form the central core of these standards or best practice rules but the standards are usually more elaborate and detailed embracing custom and practice as they relate the law to the day to day practice of corporate administration. They take into cognizance some of the nuances of practical administration that are capable to rendering legal

principles less effective. A sound system of corporate governance ensures that managers and directors of enterprises carry out their duties within a framework of accountability and transparency. In effect, codes of corporate governance revolve around the diligent and loyal performance of duties by directors and corporate managers.

The Nigerian approach was first in the formulation of a Code of Best Practices for Public Companies 2003. This is now revised and updated in the SEC Corporate Governance Code 2010 which took effect from April 2011. A notable feature of the new code is its lucid and simple prescriptions, devoid of technical terms, thereby making it readable and comprehensible by all. Key areas of corporate governance addressed in the Code include definitive provisions on the composition of boards of directors, with clear distinctions between executive, non-executive and independent directors; separation and delineation of functions between the office of chairman and that of the managing director; rules on multiple directorships as well as family/interlocking directorships; detailed rules on the role and functions of audit committees; etc.

The Nigerian Code has been adopted by the Securities and Exchange Commission as well as the Council of the Nigerian Stock Exchange as a bench mark compliance document for all quoted public companies in Nigeria. My Vice-Chancellor, Sir, you would recall that I had excluded public companies from the full rein of my proposed doctrine of qualified limitation of liability. This would be compensated by the existence of a rigorous enforcement of these new corporate governance rules.

However, the codes are non-statutory and are thus limited in scope of coverage.⁷¹ Article 1.3. of the SEC Corporate Governance Code 2010 explicitly states that the code is not intended as a rigid set of rules. It is expected to be viewed and understood as a guide to facilitate sound corporate practices and behaviour. The Code was conceived as a dynamic document defining minimum standards of corporate governance expected, particularly of public companies with listed securities. Regulatory institutions charged with the implementation of such codes, notably the Nigerian Stock Exchange and the Securities and Exchange Commission, do not have strict oversight functions over private or closely held corporations. Public corporations are thus favoured at the expenses of small corporate entities where the bulk of investible funds are domiciled. If widespread application of corporate governance codes constitutes evidence of an investor friendly legal regime, it will be misleading if such codes do not apply to the rank and file of private and closely held corporations. In my article, **Directors' Duties and the Frontiers of Corporate Governance**,⁷² published in 2011, Issue 10 of the International Company and Commercial Law Review, I had advocated the codification of the code of corporate governance in statute form. This will elevate code provisions to black letter law that can be enforced not only by regulatory authorities but also by shareholders and other stakeholders in the corporate enterprise. I advocate a

71 Art. 1.2. of the Code provides that it shall apply only to public companies whose securities are listed on a recognized securities exchange and all companies seeking to raise funds from the capital market.

72 (2011) Issue 10 International Company and Commercial Law Review 322-340. (Sweet & Maxwell, Lond.)

departure from the English *laissez faire* approach in favour of codification.

D. The Criminal Law Approach

No doubt, the criminal law regime provides a general framework for the detection and sanction of corporate impropriety of directors and managers. However, that regime has failed in effectively redressing corporate infractions. Breaches of directors' duties may not necessarily constitute a crime punishable under the Criminal or Penal code. The offences of stealing and obtaining by false pretences do not neatly define the conduct of a director who fritters away shareholders' capital for self-interest or conflict of interest preferences or otherwise exploits a corporate opportunity for profit. Moreover, criminal cases have to be reported and prosecutions are at the instance of the State and its criminal law enforcement institutions. It is, therefore, potentially selective and discriminatory.

A more recent approach is to hold corporations liable for regulatory infractions in the nature of imposition of fines. The concept is rooted in the reasoning that regulations are designed to protect owners of capital, creditors and third party dealers. Most of such regulations revolve around corporate filings and disclosure requirements enforced by Corporate Affairs Commission⁷³ and the Securities and Exchange Commission.⁷⁴ Three recent examples drawn from three continents will suffice.

⁷³ (C.A.C), established as the Companies ombudsman under the Companies and Allied Matters Act.

⁷⁴ S.E.C, established as the capital markets ombudsman under the Investments and Securities Act, 2007.

- On January 6, 2014, the Administrative Proceedings Committee of the S.E.C., cancelled the registration of Sterling Registrar Limited, a subsidiary of Sterling Bank Plc, for unlawful allotment of shares of Japaul Oil & Maritime Services Plc. The Commission also barred Kalstead Farms Investment Ltd and five people, including staff of Sterling Registrars from engaging in capital market activities for specified period. Furthermore, it imposed N5million fines on Sterling Registrars and ordered it to pay a fine of N5,000 daily from the day of the illegal allotment (6th May 2008) to the date the decision was made.
- On June 5, 2014, Cyprus's Securities and Exchange Commission imposed huge fines on two Cypriot banks and several ex-members of their Boards and executive officials for providing misleading information and manipulating information over their investment in Greek bonds. Fines on Bank of Cyprus and 12 of its top ex-officials amounted to 3,520,000 Euros (about 4,787,200 U.S. dollars) while fines on defunct Cyprus Popular Bank, known as Laiki and 12 of its top ex-officials totalled 4,065,000 Euros. Laiki was wound down under the burden of a huge debt to the European Central Bank that amounted to near two thirds of Cyprus's 17.5 billion Euro annual economy. Its assets were absorbed by Bank of Cyprus.
- In November 2014, the United States Securities and Exchange Commission imposed a fine on Clinical Diagnostic and Life Science Research Company (Bio-Rad Laboratories) for violating the Foreign Corrupt Practices Act (FCPA). Bio-Rad agreed to pay \$55m to settle the SEC's charges, which

included \$40.7m in disgorgement and prejudgment interest to the SEC and a \$14.35m criminal fine to the Department of Justice.

My Vice-Chancellor, Sir, the problem with this approach is that it ends up hurting the unintended target. Whilst non-compliance regulations and attendant fines are designed as investor protection rules, such fines invariably and ultimately impact on profits and dividend payments. The corporation is fined and the shareholders or owners of capital bear the brunt while the erring or delinquent director/manager is let off the hook and is free to sin again and again in the name of the corporation.

Re-visiting the Garb of Corporate Personality and Lifting the Veil

It is in the context of the foregoing monstrous actions of shareholders-in-control and directors/managers that I propose a re-visit of the concept of corporate personality and the principle of lifting the corporate veil. The corporate personality principle has become an established cornerstone in corporate law and it may appear inconceivable to advocate its abrogation for unlimited liability of shareholders. What I advocate, however, is a modification of the principle in two fronts. First, that in liquidation, creditors' claims should in the first instance be satisfied from corporate assets and recourse should, in the event of insufficiency of assets, be had to shareholders and all directors in the immediate three years preceding the liquidation. When the English Companies Act, 1856 conferred the legal personality status,⁷⁵ it should not have been construed as eroding a qualified form of limitation of liability on shareholders.

⁷⁵ Section 13 Joint Stock companies Act, 19 & 20 Vict., 1856; See also section 6 of the Companies Act 1862.

Section 3 of the 1856 Act specifically permitted incorporation status with or without limited liability. The survival, through the Acts, of companies with unlimited liability justifies the lesser evil of qualified privilege. This is the first course that I propose.

Secondly, in addition to the recognised grounds for lifting the veil of incorporation, there should be an omnibus ground of “in the interest of justice.” The courts need to recognise the ‘interest of justice’ as an exceptional circumstance for lifting the veil of incorporation. This has been echoed in a number of English decisions but the courts have been reluctant to give it fuel to fly, preferring instead to shield shareholders and sacrifice creditors on the altar of expediency. Whenever the interest of justice demands it, the veil of incorporation should be lifted to address the claims of creditors and other third parties. My Vice-Chancellor, Sir, in a 2007 article, published in the *International Company and Comparative Law Review* titled, “**A Comparative Analysis of the Extent of Judicial Discretion in Minority Protection Litigation: the US and the UK**,”⁷⁶ I examined the roles of judges in protecting minority shareholders. It is submitted that greater latitude need to be expounded and advanced by the courts in protecting corporate assets and the interest of minority shareholders from the capricious and exploitative actions of directors/managers as well as majority shareholders-in-control.

A vagary of lifting the veil is to give greater rights and latitude to shareholders in the redress of corporate malpractices. The rule in ***Foss v. Harbottle*** which says only the company itself can seek redress of its wrongs

⁷⁶ [2007] 5 *International Company and Comparative Law Review* (ICCLR) 181 – 198. (Sweet & Maxwell, Lond.)

give corporate directors and managers a shield of invulnerability to hide financial malpractices. The other principle in ***Percival v. Wright*** that directors' duties are owed to the company and not the shareholders has lost its steam. For shareholders are better positioned to check and seek redress of corporate wrongs than any other stakeholder in the corporate enterprise. Recent legal developments seem to give credence to this submission and expose the extant principles as ineffective in nature. My Vice-Chancellor, Sir, in my article titled "**The Death Knell of the Rule in *Foss v. Harbottle***" published in the *Journal of African Law*, 2005⁷⁷ I have indicated how the existing rules have been whittled down by the evolution of an 'Unfair Prejudice' rule. Under sections 310 and 311 of the CAMA, an application can be made to court by way of petition for relief on the ground that the affairs of a company are being conducted in a manner that is "unfairly prejudicial". The concepts of 'fairness' and 'prejudice' thus replaced that of oppression under the old Companies Act. It is not necessary now to show that the act complained of is improper or illegal and an exercise of a legal right may have an unfairly prejudicial effect. This application can be made by a very wide range of persons interested in the company including members, their personal representatives, present and past officers and creditors. The application simply alleges *that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members, or in a manner that is in disregard of the interests of a member or the members as a whole.*⁷⁸

⁷⁷ (2005) Vol.2 N. J. A. L. 22-47.

⁷⁸ See section 312(1) & (2).

If the court is satisfied that the petition is well founded, it may make such order or orders as it thinks fit for giving relief in respect of the matter complained of. This is what I had referred to as the 'Death knell of the Rule in *Foss v. Harbottle*'. The approach being canvassed here is the same as that adopted by Aderemi JCA in the Nigerian case of ***Omololu-Mulele v. Ijale Properties Co Ltd & ors.***⁷⁹He held:

...the rule in Foss v. Harbottle should not be adhered to too rigidly otherwise injustice to other persons, who have settled interest in the affairs of a limited liability company or even illegality will be unwittingly enthroned. I think the demand of justice dictates that a shareholder must possess a general right and duty to have the affairs of a company conducted in accordance with the Articles of Association. Thus, any breach by the company of the Articles would be a breach of the shareholder's personal rights."

"the courts have indeed over the years extended the frontiers of the rule in Foss v Harbottle to be in harmony with the dictates of justice and fair play.... Although the company's constitution would seem to be the main source of the rights for the shareholder against the company; I make bold to say that it is not exclusive source of such rights. A shareholder may have rights derived from the general law as was the case in Prudential Assurance v. Chatterly-Whitfield Collieries [1949] 1 All E.R. 1094, HL., ... I have said that the frontiers in the Foss v Harbottle have been gradually expanded by the courts such that if the duty performed is seen as a breach of the Articles, if that breach dovetails into an abuse of the power conferred by the Articles, an action by a shareholder

⁷⁹ [2003] 27 W.R.N. 43.

to have the abuse corrected will be entertained by the courts. This was the view taken by Hoffman J. in Re: A Company [1986] 2 All E.R. 253 that where shares were issued by a company for an improper purpose; the true basis of the action is an alleged infringement of the petitioner's individual rights as a share-holder.⁸⁰

This approach must be encouraged and advanced to break down the shackles of extant common law rules which play down the right of shareholders to enforce corporate wrongs.

My Vice-Chancellor, Sir, it is also in the context of the foregoing submission that I wish to call in aid, the role of shareholders' associations in corporate governance, particularly of public companies. Collective action by shareholders is often impossible in public companies with dispersed shareholdings and hence may be ineffective in redressing wrongs by directors/managers-in-control. The emergence of such bodies as the proactive Shareholders Association of Nigeria and the Independent Shareholders Association of Nigeria demonstrate shareholders activism in holding directors and managers accountable. The SEC pursuant to enabling powers under the ISA has underscored the role of these bodies in prescribing a Code of Conduct for Shareholders Associations and their members. The Code is intended to ensure the highest ethical standards of conduct amongst association members and the companies with whom they interact as bona fide shareholders. The ultimate goal of the associations is to make positive contributions in ensuring that the affairs of public companies are run in an ethical and transparent manner and also in compliance with the

⁸⁰ At pages 59-60.

Code of Corporate Governance for public companies. I commend this revival of shareholders' interest in governance as I strongly believe that an informed and active shareholders' body is the ultimate check on executive financial recklessness.

The Law Reform Process

The foregoing embodies a clarion call for law reform in several aspects of corporate law to redress the monstrosity in corporate directors and managers. A proactive judiciary, particularly at the Supreme Court, can revisit these principles in the light of the analysis presented above. However, statutory law reform presents a more ready and effective avenue for fundamental law reform. Company law matters are enshrined as part of the federal exclusive legislative list under the 1999 Constitution.⁸¹ Hence, law reform in this area, outside the strides of a vibrant judiciary, must be channelled through the Federal Executive. The responsibility for this has been vested in the Nigerian Law Reform Commission created in 1979 under a federal enactment.⁸² The functions of the Commission are detailed in section 5 of the Act to include:

- a. To receive and consider proposals for law reform which may be referred to it by the Attorney-General of the Federation;*
- b. To prepare on its own initiation and submit to the Attorney-General from time to time, programmes of different branches of the law with a view to law reform;*
- c. To undertake pursuant to any recommendation approved by the Attorney-General, the examination of particular branches of the law and the formulation by*

⁸¹ Second Schedule, Part I, Item 32.

⁸² Nigerian Law Reform Commission Act, (Decree No. 7 of 1999, retained as Cap. 313 LFN 1990); now Cap. N118 LFN 2004.

means of draft legislation or otherwise of proposals for law reform therein;

- d. To prepare from time to time, at the request of the Attorney-General comprehensive programmes of consolidation and statute law revision and undertake the preparation of draft legislation pursuant to any such programme approved by the Attorney-General; and*
- e. To provide advice and information to the Federal Government departments and other authorities or bodies concerned, at the instance of the Federal Government with proposals for the reform or amendment of any branch of the law.*

Evidently, the Attorney-General drives the wheel of the Commission, for everything to be done requires his initiative or approval. The Commission thus functions practically as an agency of the Attorney-General's office. The Commission has no general mandate on reform or codification of laws, elimination of anomalies or repeal of obsolete, spent and unnecessary enactments.

In conception, the Commission should be able to embark on a continuous, sustained process of reviewing laws and proffering solutions through amendments. It is therefore imperative that its proposals must timeously reach the National Assembly whose leadership must see law reform as a primary duty. Our corporate law history does not lend credence to our law reformers. The Companies Act, 1968 held sway for 22 years before reform came in 1990. The CAMA is now 24 years old and is yet to be holistically reviewed. The problem or part of the problem can be traced to section 5(6) of the Act which requires that all end reviews/reports of the Commission shall be submitted to the Attorney-General of the Federation, who, as Chief Law Officer will study same and lay before the President such proposals for law reform. From thence, the proposals are processed for federal executive

sanction, and submission to the legislative process of the National Assembly. Attorneys-General change with the four-year term of each administration and, sometimes, changes are made in between. The absence of continuity results in unread law reform reports and expired dreams or efforts to initiate some reform. I, therefore, join all those who have deprecated this position in the past and call for a more sustained and enduring, purposeful arrangement. My suggestion is that the Commission should have direct responsibility of proposing law reform legislation to the legislative arm. Whilst the role of the Attorney-General cannot be completely eliminated in the process, it is recommended that the Solicitor-General/Permanent Secretary of the Ministry of Justice be a permanent member of the Commission⁸³ and be charged with giving Executive approvals to proposals for law reforms. A proposal for law reform from the Commission should be submitted to the Ministry of Justice for review and comments which ministry shall have 60 days within which to respond. In the event of any delay or default, the Commission shall have the right to forward such proposals to the legislative arm without further recourse to the Ministry of justice.

SUBMISSIONS AND RECOMMENDATIONS

My Vice-Chancellor, Sir, for purposes of summation and clarity, the following encompass my humble submissions and recommendations for law reform to the end that corporate directors be less monstrous and rather be more protective of corporate assets and the interests of investors.

⁸³ At present, section 2 of the enabling Act only provides for four full-time commissioners to be appointed by the President, with an Executive Secretary as chief accounting officer of the Commission.

duties is underscored by the rule in *Foss v. Harbottle* and that in *Percival v. Wright*.

- The existing statutory provisions on directors' remuneration leave grave potential for abuse in the scheme of corporate regulations. In the first place, members in general meeting are unable to have an effective say in the amount of remuneration that is to be paid to directors. Often, the requisite information for determining an appropriate remuneration is not available to shareholders.
- I submit that the provisions regulating the remuneration of managing directors in section 268 do not offer meaningful monitoring of the remuneration package of managing directors. It is questionable whether the board of directors will be bold enough to question any exorbitant remuneration being paid to the managing director especially where the managing director is a major shareholder and has a hand in the appointment of the other directors to the board. Even where the managing director is a nominal shareholder, the Chief Executive Officer still wields a lot of influence in delivering directors' perks and other perquisites of office, and being in his good books is a suave thing to plot.
- Existing rules on directors' remuneration as in section 267(2) of the CAMA do not adequately address aspects of fat cat packages. Aspects of such packages comprising perquisites of office are generally unregulated.
- I recommend a more detailed statutory provision through an amendment of the CAMA to, inter alia, place a cap on directors' remuneration. The amount of remuneration should be calculated by a referenced index of gross output or profit before tax to shareholders' fund in each accounting year. A similar

duties is underscored by the rule in *Foss v. Harbottle* and that in *Percival v. Wright*.

- The existing statutory provisions on directors' remuneration leave grave potential for abuse in the scheme of corporate regulations. In the first place, members in general meeting are unable to have an effective say in the amount of remuneration that is to be paid to directors. Often, the requisite information for determining an appropriate remuneration is not available to shareholders.
- I submit that the provisions regulating the remuneration of managing directors in section 268 do not offer meaningful monitoring of the remuneration package of managing directors. It is questionable whether the board of directors will be bold enough to question any exorbitant remuneration being paid to the managing director especially where the managing director is a major shareholder and has a hand in the appointment of the other directors to the board. Even where the managing director is a nominal shareholder, the Chief Executive Officer still wields a lot of influence in delivering directors' perks and other perquisites of office, and being in his good books is a suave thing to plot.
- Existing rules on directors' remuneration as in section 267(2) of the CAMA do not adequately address aspects of fat cat packages. Aspects of such packages comprising perquisites of office are generally unregulated.
- I recommend a more detailed statutory provision through an amendment of the CAMA to, inter alia, place a cap on directors' remuneration. The amount of remuneration should be calculated by a referenced index of gross output or profit before tax to shareholders' fund in each accounting year. A similar

cap should also be prescribed on increases in directors' remuneration.

- I propose a re-examination of the role and legal liability of auditors as corporate gatekeepers. A legal regime which absolves auditors of liability in respect of a careless audit, unless it so happens that the company itself suffers loss is absurd. I advocate a stricter regime of civil liability for auditors in meeting increasing challenges posed by several audit failures and scandals worldwide.
- I recommend that existing statutory framework for auditors' liability needs to be supplemented and advanced by common law formulations. I enjoin the Nigerian judiciary to look beyond the decision in **Caparo** when formulating the principles of auditors' liability in Nigeria.
- It is submitted that the adoption of international financial reporting standards will enhance corporate governance regimes and I enjoin all public quoted companies to adopt the standards.
- I advocate the codification of the code of corporate governance in statute form. This will elevate code provisions to red letter law that can be enforced not only by regulatory authorities but also by shareholders and other stakeholders in the corporate enterprise.
- The approach of holding corporations liable for regulatory infractions in the nature of imposition of fines ultimately does not protect investors, creditors and third party dealers. The problem with the approach is that it ends up hurting the unintended target. The corporation is fined and the shareholders or owners of capital bear the brunt while the erring or delinquent director/manager is let off the hook and is free to sin again and again in the name of the corporation.

- Instead, infraction fines should be directed at and be borne by identified directors/managers found culpable.
- The criminalisation of insider dealings by directors and others under the ISA is commendable but there is need to arm the law enforcement and regulatory authorities with sophisticated instruments for crime detection investigation and prosecution. As a practical matter, criminal sanctions may fail to meet their goals of deterrence and just punishment if offenders are not readily detected and apprehended for prosecution and punishment.
 - The problems of enforcement of capital market manipulations should be addressed by:
 - an adoption of an accusatorial procedure in insider cases where the primary duty will be on the prosecution to simply make a prima facie case, thereupon the burden of proof shifts to the accused to prove his innocence;
 - a whistle blowing provision that provides some reward for detection and prosecution of capital market manipulations;
 - by conferring on the SEC powers to prosecute capital market infractions;
 - a more elaborate use of economic penalties in order to police insider trading effectively. This requires the imposition of prohibitive fines and compensation of victims.
 - For an effective corporate law reform regime, the enabling law which charges the Nigerian Law Reform Commission with federal legislative law reform proposals needs to be amended to make the work and recommendations of the Commission more fruitful in ensuing legislation at the National Assembly.
 - Whilst the role of the Attorney-General cannot be

eliminated in the process, it is recommended that the Permanent Secretary of the Ministry of Justice be a permanent member of the Commission and be charged with giving Executive approvals to proposals for law reforms.

- A proposal for law reform from the Commission should be submitted to the Ministry of Justice for review and comments which ministry shall have 60 days within which to respond. In the event of any delay or default, the Commission shall have the right to forward such proposals to the legislative arm without further recourse to the Ministry of justice.

APPRECIATION

I thank my Vice-Chancellor, Prof. Rahamón Ade Bello for this opportunity. He graciously conceded this day out of the regular schedule of the inaugural lecture series as a golden birthday present. I thank you Sir.

My Vice-Chancellor, Sir, in the course of my academic sojourn, I owe a number of debts, evidence that capitalism thrives, for in capitalism it is good to be credit worthy and as a company law lecturer, I have been a worthy disciple. My first set of creditors are my parents Late Olorogun Samson Oyimitane Abugu, who until his death held the traditional stool of Usiavwre of Ekpan and Late Madam Maria Udin Ejoba, both of whom God chose to call in their prime. May their souls rest in peace profound. Amen.

Along with my parents, I acknowledge the role of my adorable elder sisters who have played mother to me all through the years - Sister Patience Akporoh and Sister Victoria Keyamo. The entire Abugu family of Ekpan, Uvwie Kingdom, too large to enumerate but worthy in the support and joy I have shared and continue to share with my paternal siblings. God bless you all.

To the University of Lagos, I express my profound gratitude for offering a fertile ground for my development. From humble beginnings as an LLM student in 1990 to my advent as a Lecturer II on temporary appointment, I have garnered my doctoral and professorial laurels in this great citadel. Next, I want to acknowledge Professor Cyprian O. Okonkwo who introduced me to company law in my final year at the University of Nigeria, Enugu Campus. Even though we never had any close contact, his mastery of the subject and his everyday grand entrance into the company law class was enough to ignite

and spur my interest in this area of the law. Then, there is Professor Emmanuel O. Akanki, former Head of the Department of Commercial & Industrial Law and Dean of Law, University of Lagos. He took over from Professor Okonkwo in the LL.M Class of the University of Lagos. With him there was close mentoring not only on the subject but in my personal life. It was during one of his tenor as HOD that he secured for me a temporary appointment from which I have blossomed ever since. I have few heroes in my life but to these two, I duff my hat.

To my colleagues in the Faculty of Law, I acknowledge Professor Akin Oyeboode, the oracle of jurisprudence and International law, distinctively garnishing law with linguistics; Professor Peter Fogam, the stabilising international factor; Professor Taiwo Osipitan, the point of reference in the law of evidence. I acknowledge you respectively.

To all my other colleagues, you have all impacted on me in ways too numerous to mention. I acknowledge and call on you to remain steadfast with me as we soldier on in the roles we have assumed as oracles of the law.

I acknowledge the impact of the past deans in moulding younger ones like me: Professor Akanki, Emeritus Professor Obilade, Emeritus Professor Isaac Agbede, Emeritus Professor Adedokun Adeyemi who tolerated me as a son and always reminded me that I share the same birthday as his son; Professor Agomo, Professor Oyelowo Oyewo, the millennium and transformational Dean; Professor Imran Smith, and Professor Akin Ibidapo-Obe who now sits on the Dean's sack. These truly are the giants that have made the Faculty what it is. I duff my hat to you all.

I am ever fond of Professor Egerton E. Uvieghara who though retired, has not ceased in following me. He graciously honoured me with his presence at my conferment with the title of Obori Ro Ovie of Effurun-Otor Kingdom at Effurun-Otor in 2009; Professor Amos A. Utuama, SAN one of the few living legends of law in Urhobo land. I met him in the faculty and we have had a warm relationship. He underscored the need for me to publish and secure a Chair of the University before other lures.

I also pay tribute to those who have passed on – Dr. Ehpraim Asomugha, Professors Amaechi Uchegbu, Anthony Adeogun and Abiola Ojo who instituted a self-financed grant of N50,000.00 for every staff graduand in the Ph.d programme. I was a beneficiary of that generosity and encouragement. These elder statesmen were symbols of adoration and emulation in differing perspectives.

Outside the Law Faculty, I pay special tribute to Professor Ben Oghojafor, the Ezomo of Orua r' ivie of Abraka Kingdom, a resolute worker, defender and builder of bridges across cultures. Prof. G. O Williams and his dear wife, with whom I share the same birthday have been close confidants over the years. I cherish their love and friendship.

In the area of legal practice, I want to acknowledge late Dr. Ahmed Abdulai, late Professor C. O. Taiwo, Chief Ladi O. Taiwo, Ms. David Ismeal, Mr. Akin Osinbajo, Mr. Matthew Karieren and others with whom I served in the law firm of **Abdulai, Taiwo and Co., Lagos**. This firm horned my teeth in corporate legal practice. To my hard working close associates, confidants and colleagues, Sir Chima Emenyonu, Chief Christopher Omafuwe Ojenima,

Austin Ogbodo Esq, Etomi RBK Onochie Esq., Matthew Kariere Esq., Mbanefo Ikwegbue Esq., and Miss Esther Farinde, my personal secretary, I thank you for your support through the years. God bless you all.

Next, I turn to our Royal Fathers of the Day, His Royal Majesty Emmanuel Sideso, Abe I, the Ovie of Uvwie Kingdom and His Royal Majesty (Maj. Gen) Felix Mujakpero (Rtd), Orhue 1, the Orodje of Okpe Kingdom, my grand maternal Kingdom both in Delta State. Abe 1 is a father God is using to stabilise and bring prosperity to Uvwie Kingdom. He it was in 2012 who found me worthy to be conferred my second chieftaincy title of **OBO RHI IRHI** of Uvwie Kingdom, thus making me OLOROGUN ABIVE, having been honoured earlier by His Royal Majesty, EYAREYA II, Ovie of Effurun-ottor. Our Father, I thank you for being here with your Palace chiefs. All in Uvwie are proud of you. The Orodje of Okpe, a distinguished soldier and an alumni of the University of Lagos, trained here as a law student. This is a home coming for him as he has kept constantly in touch with the alumni of this University whom he hosted sometimes ago at his magnificent palace in Orerokpe, Delta State. May you live and reign in glory in the respective Kingdoms. Amen.

The President-General of Uvwie General Improvement Union, Chief MacDonald Ugbewanko, with whom I have served as 1st Vice-President General of the Union in the past three years: I salute you for your sincere commitment to the good of Uvwie land and its people. Chairman and members of UGIU Lagos, President and members of Oro Ladies Social Club, Lagos; President and members of Atamu Social Club of Nigeria, I thank you for the times we have shared and your distinguished presence here today.

I also acknowledge all old boys of Urhobo College Effurun under the able leadership of Rear Admiral John Kpokpogri (Rtd), with whom I currently serve as Vice-President of the Urhobo College Old Students' Association, worldwide. To all old boys of Urhobo College Effurun, I doff my hat in our strides and commitment to the good of our old College – Alt Optimum, alt Nihil – Its Either the Best or Nothing. Up UCE. To the distinguished members of the House of Commons and Senior Staff Club of the University of Lagos, you have all become family. With you I have visited virtually all kingdoms in Yoruba land as you have also been with me in Uvwie Kingdom. God bless you all and please keep the tradition.

My Vice-Chancellor, Sir, I have published five major textbooks in the course of this journey, namely:

1. **Company Securities: Law & Practice, 1st edition** (2005);
2. **A Treatise on the Application of ILO Conventions in Nigeria** (2008).
3. **Foundations of Corporate Law** (2010).
4. **Company Securities: Law and Practice, 2nd edition** (2015).
5. **Principles of Corporate Law in Nigeria** (2015).

These, in biblical terms are the fruits of my academic labour. The most valuable however, is the natural offsprings that God has charged me with. "Charged me with" because children are a responsibility charged upon us by the Almighty. ATANUMETA, BABADEDE, EDUVIE and others yet unborn, I give God the glory for your coming and existence in my life.

I have yet another first child, no other that the wife of a great professor of Philosophy, Mrs. Adesola Falaiye, my

first Ph.D. candidate and graduand. You opened the gate for others to follow. This inaugural would have been barren without you. It shall be well with you. Yet there are many others, some still under supervision including my students in the undergraduate and postgraduate classes in my various subjects. I fondly call them "my disciples", who take my company law gospel far and wide. Your presence here in large numbers is a testimony of the love you have for me and how we have all impacted our lives. As disciples in the legal postulations that I dispense, I charge you to go ye into the world and carry the law far and wide to all nooks and crannies. I salute you.

Whilst I have travelled only a few scores in life, I have found love and favour wherever I thread. I acknowledge all those whom God has thrust on my path at different times. They form part of the golden link in the chain of life.

Now, to my beloved, the radiance of my heart and the mother of my tribe, my adorable wife, PHILOMENA, JOE-ABUGU. She blazes the trail in the JOE-ABUGU dynasty. She is the mother of this new tribe in the Abugu lineage of Uvwie Kingdom. I love and appreciate you for your sincere love, understanding and support.

My Vice-Chancellor, Sir, I pray you accept the foregoing as payment for the debt I owe this great institution for finding me worthy of elevation to the rank of great professors that have thread and passed through this citadel. It is by no means the end of my contribution to learning but I pray you discharge me of this principal debt and you will kindly treat all future and additional contributions thence as investments on the sands of time to which I should be bountifully rewarded in dividend, even in retirement.

TO ALMIGHTY GOD, I GIVE ALL THE GLORY!

God Bless the Faculty of Law, University of Lagos

God Bless the University of Lagos

Long Live all who have witnessed this day.

My Vice-Chancellor, Sir, this is my inaugural lecture!!!

BIBLIOGRAPHY

- ABUGU, J. E.O., **Company Securities : Law & Practice**, University of Lagos Press, 2005.
- **Foundations of Corporate Law**, University of Lagos Press, 2011.
- **Principles of Corporate Law in Nigeria**, MIJ Professional Publishers, Lagos 2015.
- **Company Securities: Law & Practice**, 2nd Edition, University of Lagos Press, 2015.
- **Primacy of Shareholders' Interests and the Relevance of Stakeholder Economic Theories**, (July 2013) Issue 7 Company Lawyer, 201. (Sweet & Maxwell, Lond.)
- **"Re-Examining the Role of Auditors and Audit Committees: Nigeria and the UK in Perspective"**. (March, 2013) International Journal of Disclosure and Governance, p.1-24. (Rutgers Business School, University of Newark, NJ.
- **"Monitoring Directors' Remuneration, Fat Cat Packages and Pecks of Office"** (2011) Issue

19:1 Journal of Financial Crime
(Sweet & Maxwell, Lond).

..... **"Directors' Duties and the
Frontiers of Corporate
Governance"** (2011) Issue 10
International Company and
Commercial Law Review 322-340.
(Sweet & Maxwell, Lond.)

..... **"A Comparative Analysis of the
Extent of Judicial Discretion in
Minority Protection Litigation: The
United States and United
Kingdom"** [2007] 5 International
Company and Comparative Law
Review (ICCLR) 181 – 198. (Sweet &
Maxwell, Lond.)

..... **"Technology, Globalisation and
the Nigerian Securities Market"**
(2003) J. Int'l. Banking Law
Regulation, pp. 284 - 292. (Sweet &
Maxwell, Lond.)

..... **"The Death Knell of the Rule in
Foss v. Harbottle"** (2005) Vol.2 N.
J. A. L. 22-47.

..... **The Statutory War on Insiders**
(2002) Vol. 1 pp.105-128 in "The
Commercial and Industrial Law
Review", journal of the Department of
Commercial & Industrial Law, Faculty
of Law, University of Lagos.

..... **Company: A Visit to Trans-Atlantic Shipping Agency Ltd v. Dantrans Nig. Limited"** (1998) Vol.2 No.3 Fin. & Investment Law Quarterly Comp. Rev. of Law and Practice, pp. 198 - 203.

..... **"Issues and Problems in Corporate Governance in Nigeria"**, being a Paper presented at National Conference on Law and Economic Transformation in Nigeria organized by the Faculty of Law, Obafemi Awolowo University, Ile Ife, in commemoration of the Faculty's 50th Anniversary, July 11-13, 2012.

Adolf Berle, Jr. **The Modern Corporation and**
& Gardiner Means, **Private Property**, New York:
The Transactional Publishers,
1932.

Akanki, E. O., **The History of Company Law**,
(1977-80) 8 N.J.C.L. 175.

Akanki, E. O., **"The Legal and Practical
significance of Disclosure and
Publicity of Company Information"**
(1976-78) Nig. Bar Jor., 13-27.

Berle, A.A., **"For Whom Are Corporate
Managers Trustees?: A Note"**,
[1932] Harv. L. Rev. 1365.

- Dodd E.M., **"For Whom Are Corporate Managers Trustee?"**, [1932] Harv. L. Rev. 1145.
- Franklin Gevurtz, **"The Globalisation of Insider Trading Prohibitions"** (2002) 15 Transnat'l Law 63.
- Harry Glasbeek, **Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy**, Toronto, Canada, Between the Lines Press, 2002.
- Jensen M, & Meckling W., **"Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure"**. (1976) Journal of Financial Economics, 8.
- Louis Brandeis, **Other Peoples' Money and How the Bankers Use It**, New York: Cosimo Classics, 1914.
- Orojo, Olakunle **Company Law and Practice in Nigeria**, 3rd ed., Lagos, 1992.
- Paul L. Davies, **Gower's Principles of Modern Company Law**, 6th ed, London, Sweet & Maxwell.
- John Pound, **"The Promise of the Governed Corporation"** (2000) Harvard Business Review on Corporate Governance, 79. (Boston, Mass: Harvard Business School Publishing).

