SECTION 303 OF NIGERIA'S COMPANIES AND ALLIED MATTERS ACT (CAMA) 2020: AN ELIXIR OR A CASE OF NEW WINE IN OLD SKIN?

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ABSTRACT

The Companies and Allied Matters Act, 2020[i] came with innovations aimed at opening up the Nigerian corporate space, boost the Federal Government's Economic Recovery and Growth Plan with a view to launching Nigeria into top 70 economies by 2023. One of such provisions is s. 303 which is an improvement on s. 277 of CAMA 2004. The section regulates self-dealing by directors. This paper set out to discover what differentiates s. 303 from s. 277 of CAMA 2004 and if it could achieve the envisaged utopian ambition within existing regulatory and inhibiting factors which contributed to the abysmal performance of s. 277. The paper is non empirical, library based and adopted a doctrinal approach. The paper exposed normative and other factors which impeded the success of s. 277 thereby rendering the system vulnerable to directors' Machiavellian manipulations. The paper found ineffective regulatory systems, archaic justice delivery system which snails justice dispensation and lack of deterring sanctions as some of the factors which impeded the success of s. 277. It concluded that these factors still exist in Nigeria and are likely to stymie s. 303 thereby hindering its effectiveness. The paper therefore prescribed short prison terms, restitutive penalties and the need to grant financial autonomy to the Nigerian judiciary to enhance modernisation of courts as a way out of the present quagmire.

Keywords: CAMA, Normative, Stymie, Machiavellian, Elixir, Directors, Self-dealing, Snails.

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INTRODUCTION

The Nigerian Company Law as it exists today is part of our colonial relics, although the law has undergone some fitful amendments since then. Common Law principles of absolute loyalty by company directors became the basis of directors' obligations in Nigeria. The Companies and Allied Matters Decree 1990, which was later designated as The Companies and Allied Matters Act imbibed the gamut of fiduciary obligations of company directors with its strict liability principles from Common Law. The imposition of these somewhat onerous liabilities on directors is a consequence of their peculiar position in the company. These positions will be examined with their attendant obligations in this work.

The Companies and Allied Matters Act 2020 which is the latest upshot of CAMA 1990 came with some interesting changes aimed at making the Nigerian corporate space more robust, friendly, competitive and in tune with global best practices. For instance, by ss. 394 and 395, it creates what it terms as small companies and small parent companies, and makes it easier for these companies to register and operate businesses in Nigeria.

It abolishes the practice of one person being both the Chief Executive Officer and Chairman at a company's general meeting,[ii] which had been a contentious issue before now. Section 181(2) makes it possible for a single person to form a private company. Sections 119 and 120 makes it mandatory for persons with significant control of a company to disclose this fact to the company within seven days. Public companies are now mandated to display their audited accounts on their websites.[iii] Also, by s. 238, renumerations of company managers are to be disclosed at the company's annual general meeting. Private companies can now hold their annual general meetings electronically.[iv] This is to encourage greater participation by company members. These are all targeted at opening up the Nigerian corporate space, encourage transparency, information availability to other stakeholders and generally, align it with what is current globally.

CAMA 2020 is also expected to boost the Federal Government's Economic Recovery and Growth Plan (ERGP 2017-2020). This program is expected to launch Nigeria into being ranked among top 70 economies in the World Bank Doing Business Index by 2023. Nigeria is currently ranked 131 out of 190 economies.[v] This assessment is based on how conducive and

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protective the regulatory environment is to investors. The Presidential Enabling Business Environment Council, (PEBEC), headed by Nigeria's Vice President was given the mandate to make recommendations on institutional reforms to promote Nigeria's investment attractiveness. It is not surprising therefore, that CAMA 2020 came with the above highlighted and other interesting innovations.

Despite these innovative provisions, CAMA 2020 reduplicates the fiduciary obligations of company directors with its attendant strictness. One of such obligations is the no conflict rule. This makes it obligatory on directors to avoid conflict of duty and personal interest.[vi] They are thus duty bound to disclose any real or potential conflict between the two. What is however of interest to this work is the obligation by directors to disclose such conflict whenever they are interested in transacting with their companies. This was originally contained in s. 277 of CAMA 2004. The section has undergone some form of bland amendments. These amendments catalysed in what is now s. 303 of CAMA 2020. It should be noted that the interest needed to be disclosed by a director here is somewhat different from that expected to be disclosed under s. 306(6). Section 306(6) covers other instances of self-dealing by directors while s. 303 specifically regulates self-dealing as regards transactions with the company by directors. Self-dealing by directors presents a classic case of conflict and this constitutes a breach of fiduciary duties[vii]. Self-dealing occurs when a fiduciary engages in a transaction for his own benefit rather than for the benefit of the one to whom he owes fiduciary duties.[viii] For our purpose, self-dealing occurs when a director uses his vantage position to transact with his company without the prescribed disclosure. Section 303 attempts to deter directors from harmful opportunism.

This work intends to examine the provisions of s. 303 with a view to exposing the innovations therein. It will also x-ray the provisions of s. 277 of CAMA 2004 in order to appreciate the distinguishing aspects of the two provisions. The work will also interrogate the utility or otherwise of the new provision as it affects the company and conformity by directors. The work questions whether this well intended inclusion is enough to affect attitudinal behaviors towards enforcement by the different stakeholders. This work expostulates on whether s. 303 without more is capable of inducing compliance by directors especially in view of existing challenges. The corporate space will be rummaged to ferret out the problems which militated against s. 277 of CAMA 2004 with a view to ascertaining whether they still exist and are capable of affecting the new provision. These are some of the issues this work intends to interrogate with a view to

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uncovering whether this section can salvage the corporate putrescence currently afflicting the nation.

HISTORICAL AND THEORETICAL ANTECEDENTS OF DIRECTORIAL OBLIGATIONS IN NIGERIA

Historically, the Nigerian Company Law structure as we know it today has its roots from early Company Law structures and practices in England. Most English Law traditions and practices found their way into the Nigerian legal system by virtue of Nigeria's history as a former British colony. During this time, only foreign companies operated in Nigeria and English Common Law and the doctrines of equity applicable in England as at 1st January 1900 were applicable by virtue of s. 14 of the Supreme Court Ordinance 1914. Consequently, English Common Law together with the doctrines of equity applicable in England on that date, became applicable in Nigeria as received English Law.[ix] Thereafter, all Nigerian Company Law ordinances from 1912 to Companies (Amendment) ordinance 1954, drew a lot of inspiration from English Companies Acts. After Nigeria's independence, the 1954 ordinance was designated as Companies Act in 1963. This was replaced by Companies Act 1968. This was equally later replaced by the Companies and Allied Matters Decree 1990. This decree codified for the first time, the fiduciary duties of company directors which hitherto were existing as Common Law principles. Although the 1990 Decree had undergone intermittent amendments since then, it did not affect the basic principles of directors' duty of absolute loyalty to their companies.[x]

Directors' duty of absolute loyalty existed prior to the Joint Stock Companies Act of 1844.[xi] These rules existed and were applied by Judges, not as a result of any law, but basically as judges made rules. This was so because, at this time, joint stock companies were unincorporated and their validity depended on executing a deed of settlement which vested their properties on trustees. Directors were at this time their companies' trustees and so, courts of equity adopted this nomenclature for them.[xii] This appellation continued even with the advent of incorporated companies because of their fiduciary positions. This led the early courts to hold them liable for breach of trust even when the courts realised that directors are not trustees in the strict sense, they continue to hold them liable by analogy.[xiii]

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However, learned writers are divided on the origin of this appellation. Davies et al[xiv] for instance, hold that this description is less apposite in this era of incorporated companies where companies are separate legal entities, capable of holding their own properties. Accordingly, directors should be seen as agents rather than as trustees. Nevertheless, like Hick and Goo[xv] they agree that the appellation grew by analogy, even though the later authors went on to blame it on the conservatism of the Law. Sealy[xvi] on his part, hold that the appellation was due to the limited legal vocabulary of the time and questions, why this old label has persisted till date. Nonetheless, he agrees that the emergence of fiduciary liabilities in the nineteenth century has placed directors in the true position of trustees. Lord Hardwick seems to have given early credence to this, when he held in *Charitable Corporation v. Sutton*[xvii] that, directors who had misapplied funds were liable for breach of trust as if they were trustees. Instinctively, it appears that the practice during the Deed of Settlement days must have influenced the principle of holding directors liable as trustees of their companies and this has persisted till this day. Thus, as trustees, powers granted to them are held in trust for the company and they can be held liable for abuse of such powers.[xviii]

The liability of directors as regards contracts while they are directors is hinged on the fact that Common Law also regarded company directors as agents of their companies.[xix] Therefore, they are governed by the general principles of the law of agency which governs the relationship between a principal and his agent. Consequently, whenever an agent would have been liable under any transaction, the director will be liable.

The natural consequence of the director's peculiar position as a trustee and an agent of the company automatically makes him a fiduciary of his company. This position imposes fiduciary duties on the director to act with utmost good faith in his dealings with and for the company. He is to disclose to the company whenever his personal interest conflicts with his official duties to the company. The existence of these duties led Lord Cransworth L. C. in *Aberdeen Rlwy Co. v. Blaikie Bros*[xx] to hold that no one in that position is allowed to enter into any transactions where there is a possibility of his personal interest conflicting with the of those he is bound to protect.

This is the basis of directors' self-dealing rule in equity. It is a strict rule which prohibits any form of transactions between a company director and his company, unless there

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has been full disclosure and approval given by the company. Since this rule is strict, the director is not permitted to show that the terms of the contract are fair. Neither are the courts interested in knowing whether the terms would still have been the same in the absence of conflict. Though this may seem onerous to directors, it lightens the burden for the courts.

Just as a trustee cannot purchase trust property, directors cannot enter into any contract on behalf of the company with any of their members. If this happens, the contract is voidable at the instance of the company.[xxi] As agents also, they are not expected to contract with the company just as an agent cannot contract with his principal. In *Tito v. Waddel, (No.2)*[xxii] Lord Megary V. C. held: "If a trustee purchases trust property from himself, any beneficiary may have the sale set aside *ex debito justitiae*, however fair the transaction." As trustees and agents, directors are not expected to contract with the company irrespective of fairness of the transaction.[xxiii] This strict Common Law position was adopted by CAMA 1990 and persists till date in CAMA 2020.

It is apposite to also glean through the theorised origin of the concept of directorship. These customs are believed to have influenced the practice of companies being governed by elected boards of directors. There are attempts to link the origin of company boards to medieval European Parliaments. This view holds that company boards emerged as imitations of such parliaments. The parliaments were representative and had the power to bind those represented. Gevurtz[xxiv] supports this and asserts that despite marked differences between early company boards and the medieval parliaments, similarities abound which could suggest a common conceptual heritage. The existence of town councils in medieval English communities which were created by charters just like modern companies and the existence of guilds for different functions within the community are also given as influential factors.[xxv] The guild had a governing body which was made up of a governor and an assistant. By the end of the 17th century, the assistant governors were being referred to as directors. This may have direct influence on the early companies, since most of them were formed as trading or merchant guilds.[xxvi] Irrespective of the diverse views on the origin of a board-based management model in companies, there is a consensus that directorial duties are key elements of company governance. Keay,[xxvii] for instance, asserts that these duties have existed for over 150 years in England. Despite diverse views on this, the need for companies to have this model of

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governance structure arises from their artificial personality and the need for investors to invest without being involved in management. Even where there were no legislative provisions for the appointment of directors, early judicial pronouncements clearly demonstrated the exigencies of the time.[xxviii]

THE DIRECTOR UNDER CAMA 2020

By s. 269(1) of CAMA 2020, a company director in Nigeria is a person duly appointed by the company to direct and manage the business of the company. s. 269(2) contains a rebuttable presumption in favor of innocent third parties who deal with persons put forward by the company as their directors. If such a person holds himself out as a director, he commits an offence and is personally liable.[xxix] By s. 269(4) the company is liable if it held him out as its director. Section 270 extends the definition of a director to include shadow directors. Section 276 simply re-emphasises the provisions of s. 269(3) and (4) as regards persons acting without due appointment. Section 269 places emphasis on due appointment. Thus, by this section, the company must properly appoint such a person to manage the business of the company. This seems to contradict the provisions of s. 868 which states that a director; '...includes any person occupying the position of director by whatever name called; and includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act.'

The definition by s. 868 is however, functional in nature and identifies the director through his functions. It covers all categories of directors in the company as well as the shadow director who is the eminence grise. The two sections appear to be contradictory because while one places emphasis on due appointment, the other recognises the director through his functions. Section 868 takes after s. 395 of the 1968 Nigerian Companies Act which also covered all persons ostensibly occupying that position and performing the normal functions of a company director. Section 868 seems to suggest the existence of apparent authority for the occupant of that position thus, an issue arises as to which criteria should be followed. The use of the phrase "by whatever name called" in s. 868 suggests the fact that company directors could be called by various names depending on their portfolios. Thus, it is common in Nigeria to have directors

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being addressed as managing directors, executive directors or even general managers. It can be said that the intention of the section is to give a definition that is wide enough to cover the different designations. Both ss. 270 and 868 recognise shadow directors. Thus, a creditor bank which regularly instructs directors of a debtor company and whose instructions the company regularly obeys could be regarded as a director.[xxx] It may be said that this position by CAMA is aimed at preventing escape from liability by both the occupant of the office and those who influence company decisions.

The 1987 Nigerian Law Reform Commission on the reform of the Nigerian Company Law,[xxxi] in a bid to be more precise, recommended that the determining factor should be due appointment and not based on functions alone. This must have informed the inclusion of s. 244(1) of CAMA 2004, which is reproduced in s. 269(1) of CAMA 2020 which also recognises the director as an agent and a trustee. It states in 309(1):

> Directors are trustees of the company's money, properties and their powers as such shall account for all the money over which they exercise control, refund any money improperly paid away, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own or sectional interest.

Section 309 reproduces s. 283 of CAMA 2004 and Nigerian Courts have always acted in line with these declarations.[xxxii] Section 309 amply places the director in a fiduciary position. This position is boldly accentuated by s. 305 which also proclaims the director to be a fiduciary of his company. Section 306 prohibits conflict of personal interest with his official duties to the company. This section, like the common law position, favours disclosure to the general meeting if he is to escape liability. The section can be taken to regulate directors' general conducts and may help to check competition with the company or usurpation of corporate opportunities. Since CAMA has declared directors to be agents and trustees of their companies, these attributes naturally flow with such a declaration. However, directors exercise wider discretion in the performance of their functions. This is somewhat different from the way a trustee deals with trust property. While a trustee has no discretion in the way he deals with trust property, a director exercises wide discretion and sometimes takes risks which is in tune with his business judgement.

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Section 309(2) which states that a director is to be regarded as an agent of the company when he acts within his authority and the powers of the company should be interpreted to cover both real and ostensible directors. If this is not so interpreted, it will negate the principles of the law of agency and jeopardise third party interest.

DIRECTORS INTEREST IN CONTRACT WITH THE COMPANY UNDER S. 277 OF CAMA 2004

Section. 277 contained one of the principles adopted from common law. Since the director is both an agent and a trustee of his company, he is not expected to contract with his principal or deal with trust property in a manner which is inconsistent with his position as a trustee. Every real or potential conflict of interest is expected to be disclosed. Section 277 expressly mandated directors to disclose direct or indirect contracts with the company. If a director contracts with his company, it will amount to contracting with himself, since he is also the alter ego of the company. This was the reasoning in *F.R.N. v. Ikpe,*[xxxiii] where the court held that a director is incapable of conspiring with the company, because it will amount to conspiring with himself. This is why this is called self-dealing. Section 277(1) expected a director "who is in any way directly or indirectly interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of directors…"

By s. 277(2) a director who was interested in a proposed contract was expected to declare such interest at the meeting of directors at which the issue first arose, or at any other meeting called after he became so interested. For this purpose, a general notice given by a director to his colleagues, indicating that he is a member of a particular company and should therefore be regarded as an interested party in any contract between their company and the company specified in the notice is deemed as sufficient declaration of interest in relation of any contract so made.[xxxiv] This notice will not have effect unless given at the meeting of directors and it is the duty of the director concerned to ensure that is it brought up and read at the next meeting. The penalty for lack of compliance was N100.

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The prohibition against self-dealing contained in s.277 was framed after the equitable principle in *Keech v. Sandford,*[xxxv] which forbids trustees from purchasing trust property no matter how fair the transaction may be. It should be noted here that the disclosure expected of a director under s.277 is different from the one in s. 280(6) of CAMA 2004. While the earlier section stipulated disclosure to the board, the latter provided for disclosure to the general meeting. There is also disparity in the effect of non-disclosure. In the event of non-disclosure, the erring director in s. 280(6) was dispossessed of all the resultant profit, whereas, an erring director under s.277 was only liable to one hundred naira (N100) fine. One therefore wonders if this miserable fine was really meant to discourage breach of the provision.

THE POSITION UNDER S. 303 OF CAMA 2020

Section 303 of CAMA 2020 specifically addresses situations where directors are interested in contracting with their companies. It takes after s. 277 of CAMA 2004, but, with some material and interesting differences. Section 303(1) makes it obligatory for a director 'who is in any way whether directly or indirectly interested in a transaction or proposed transaction with the company to immediately notify the directors of such company in writing...' The written notification must specify the particulars of his interest. By s. 303(2), the interested director can only satisfy this section if he discloses particulars of the transaction to the board. For this purpose, a general notice given by the interested director to his colleagues on the board to the effect that he is a member of a particular company and so should be regarded as an interested party in any transaction between that company and theirs is not deemed to be sufficient disclosure of interest. It is the interested director's duty to disclose all material information that can help the board arrive at informed decisions. He must also take all necessary steps to see that his disclosure is brought up and treated at the next meeting of the board after it was given.

Section 303(3) which contains penalty for breach of this provision states that the offender will be liable to a fine as contained in the Corporate Affairs Commission's Regulation. Thus, by s. 206 of Companies Regulation 2021, a director in a small company will be liable to a daily default penalty of N250 and a one-off penalty of N5,000, while a private company other than a small company will be liable to a daily default penalty of N500 and a one-off penalty of

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N10,000. A defaulting director in a public company will be liable to pay N1,000 as daily default penalty and N25,000 as a one-off penalty. The penalty for a director in a company limited by guarantee is the same as that of a director in a private company. One is forced to ask whether these penalties are meaningful enough in present day Nigeria to trigger the needed attitudinal changes in directors? Can these penalties also engender the needed impetus in stakeholders who are meant to enforce this provision? The position of the English Companies Act 2006 is more attractive as it allows the application of both common law and equitable principles in event of breach of s. 177 of the Act which contains the self-dealing rule. Equitable principles are known for their strictness in punishing fiduciaries who have breached their duties. This is what would have been appreciable in Nigeria today.

SALIENT AND NOVEL ASPECTS OF THE PROVISIONS OF S. 303

I. There must be an 'immediate' notification of interest the moment such interest arises. The requirement of immediate declaration was absent in s. 277 0f CAMA 2004. This underscores the importance s. 303 attaches to early declaration. If interpretated strictly, it means that one could be held liable for late declaration of interest. However, this author opines that, for a director to be liable, it must be shown that the director was aware of the existence of that interest. This is necessary as early declaration is beneficial to the company's decision-making process.

II. The declaration to the board must be in writing while it appears that an oral declaration could have been sufficient under s. 277 of CAMA 2004. This precise provision in s.303 takes care of ambiguities in interpretation.

III. The notification must disclose particulars of the transaction. A general notice without disclosure of particulars of interest which was hitherto sufficient under s. 277 of CAMA 2004 is no longer deemed sufficient. This is highly commendable as a declaration with particulars of interest is helpful to the board in taking the right decisions.

IV. The requirement for declaration of interest after the company has entered into the transaction is absent in s. 303. This tends to suggest that the section does not tolerate declarations of interest in respect of already executed contracts.

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V. The penalties for breach are also different. There are improved fines under s.303, but the question one may ask is whether these fines can deter directors in the Twenty-First Century from self-dealing? The obvious answer is in the negative.

ADEQUACY OF DECLARATION

Section 303 clearly underscores the need for sufficient disclosure. The type hypothesised by Cardozo J in *Wendt v. Fisher*.[xxxvi] According to him, such disclosure must be unambiguous, exposing the truth in its stark significance. The section expects the declaration of interest to be explicit. This is reminiscent of the judgement in *Liquidators of Imperial Mercantile Credit Association v. Coleman*[xxxvii] where the court emphasised that a man does not declare his interest by simply stating that he has an interest. According to the court, he must state what his interest is. Section 303 gives graphic details of what should constitute sufficient disclosure, but failed to state whether the affected director should be excused from the meeting. Technically, a director who has given notice of his interest in a transaction is not expected to be present at a meeting in which the transaction is being deliberated, otherwise his presence may influence the outcome of the meeting.

Despite the clear provisions of s. 303, an issue may arise where the contract constituting the interest is known to all the directors. The question that may arise here is whether there is need for formal disclosure or whether disclosure can be implied in the circumstance. While some courts are willing to overlook disclosure in this circumstance, others stress the need for formal disclosure especially for record purposes.[xxxviii] The Court in *Gwembe Valley Dev. CO. Ltd. v. Koshy (no. 3)*[xxxix] refused to accept as sufficient, piecemeal information gathered by the directors.

Section 303 stipulates formal and sufficient notification. It is our considered opinion that this should still be done even where all the directors are aware of the interest in issue as this will protect them against accusations of improper dealings. A formal declaration and recording in the minutes book are overt demonstrations that they acted *bona fide* and not indirectly distributing the company's assets among directors as was the case in *Mac Pherson v. European*

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Strategic Bureau Ltd.[xl] It is easy to conjecture that Nigerian Courts will lean towards a strict interpretation of s. 303 and demand written notification and proper disclosure of interest.

An interesting scenario occurred in the Australian case of *Permanent Building Society (in Liquidation) v. Wheeler*.[xli] Here, the Chief Executive Officer (Hamilton) disclosed to the other directors that he could not take part in a particular deliberation and voting because of a likelihood of conflict of interest. The company went into liquidation because of the poor decision taken at the meeting by the other directors. The court still held Hamilton guilty of breach of duty, since he failed to ensure that the other directors voted rightly. The court also stated that he failed to give his colleagues relevant information which would have helped them to take a more informed decision. The reasoning behind the court's decision could be what s. 303 seeks to avoid by compelling directors to make full disclosure of material information. The question then was how a director in that circumstance is expected to act. The Australian Supreme Court in a later case admitted that this was a difficult question.[xlii]

As noted above, s. 303 is silent on the issue of attending such a meeting after proper notification. Despite this silence, it is reasonable to expect that the interested director will be excused from the meeting. If, the interested director has clearly specified particulars of the transaction, it is rational to submit that he need not do more. If the other directors take wrong decisions on the subject, they should be held accountable for it. Section 303 is bolder, more explicit and seems to have taken care of some of the lapses that were inherent in s. 277 of CAMA 2004. However, other than the requirement for 'immediate' notification in s. 303 (1), the section is unlike s. 177(3) of the English Companies Act 2006, which expressly mandates notification to be made before the company enters into the transaction. A provision like this is more explicit and devoid of ambiguities in interpretation and application. We submit that s. 303 would have been clearer if it has such an unequivocal provision.

Section 303(1) requires notification of interest by the interested director if he has a direct or indirect interest in a transaction or proposed transaction. Thus, this would cover situations where the director is the main contracting party or where he is, for instance, a shareholder in another company which intends to contract with his company. He could also be a partner in a partnership which intends to contract with his company, as was the case in *Aberdeen Ry v. Blaikie*.[xliii] Section 184 of the Indian Companies Act 2013 is more definitive. It expects a

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director who holds more than 2 percent shareholding or who is a promoter, manager, chief executive officer or partner in a firm which intends to contract with a company in which he is a director, to disclose this to his colleagues. In addition, he is not expected to participate in the meeting. Section 303 of CAMA 2020 is silent on the issue of attendance at the meeting. In Blaikie's case, the court held the contract voidable at the instance of the company. However, this case has been described as providing merely a default rule since the prohibition can be waived by those permitted to do so.[xliv] Following this reasoning, s. 303 can be said to be a default provision since disinterested directors can approve the transaction. Commenting on directors' indirect interest in contract, Girvin and others[xlv] suggest that any company in which the director is a member or a director, or contracts in which the director's spouse has a direct interest come within this purview and will grant the affected director an indirect interest. It is here submitted that this should be the type of indirect interest referred to by s. 303(1) even though it is not so stated.

Regrettably, CAMA has not defined the phrase "interested directors." This definition was missing in the old CAMA too. However, s. 2(49) of the Indian Companies Act 2013, defines it to include those who act through their relatives, associations and companies where they are members or any of their relations are members, directors or partners. Thus, whenever any of these persons or organisations are interested in a contract, the director should be deemed to be interested. It is hoped that Nigerian courts will define an indirect interest of a director in a similar way.

Section 303 cannot be said to be so precise in scope. CAMA should have helped in stating the scope of the section by defining who should be regarded as an interested director for the purpose of the provision. Also, the requirement of particulars of interest in the section should state the nature and extent of interest. For instance, it is not enough for a director to state that he has interest in the company which intends to contract with his company. He must clearly specify the extent of his involvement in that company. For example, he must specify whether he is an ordinary shareholder, a controlling shareholder, a director or even a creditor. This is in addition to clearly giving particulars of the transaction. Just as a trustee who has a duty to sell trust property at the highest price, is not allowed to buy such property because his personal interest to buy at the lowest price will conflict with his duties, a director is not allowed to contract with his company except as prescribed by s. 303.

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The prohibition against interested directors or self-dealing is assisted by s. 301 which requires every company to keep a Register of Director's Interest. For this purpose, every director is required to give a written notice to the Board of Directors on matters relating to himself which are necessary for the purpose of ss. 301 and 303.[xlvi] Also, a director or any person connected with him cannot enter into an arrangement with the company to acquire the company's assets of certain requisite value.[xlvii]

Once a contract has been approved by the Board, the burden is on the person challenging it to show bad faith. Section 303 unlike s. 306 of CAMA 2020 is not outrightly prohibitory in nature, nor does it provide for ratification as was the case with s. 277 of CAMA 2004. Rather, it contains what Tuch[xlviii] calls a cleansing device by providing for disclosure and approval by disinterested colleagues on the board. Section 303 is a regulatory provision. A breach of the provision and neglect or refusal to act on behalf of the company by directors may give rise to shareholders' action under s. 343 by commencing a derivative action under s. 346.

It can be stated categorically that s. 303 is an improvement on s. 277 of CAMA 2004 and that the provisions if well implemented can create more conducive atmosphere not only in the board rooms, but also in the company at large. The written declaration enhances transparency and trust amongst the stake holders. This ultimately leads to better corporate governance. However, the nerve-wracking issue here is how to get this seemingly beautiful provision to achieve its full potential and cure the mischief which s. 277 of CAMA 2004 was unable to solve. If things are not done differently, then s.303 will be another beautiful provision in Nigeria that yields no desired result.

ENFORCEMENT AND DUE PUNISHMENT AS A CATHOLICON

Enforcement of duties presupposes the existence of some legally recognised duties or obligations and the act of ensuring compliance or effectiveness of such duties and obligations.[xlix] This could be by coercion to compel compliance or through some non-formal methods. The need to compel compliance to laws relating to company directors is to forestall the calamitous consequences of the breach of such laws to companies and the society at large.

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This is imperative because a strict enforcement regime enhances transparency, probity and uprightness both in the company and in the securities market.[l] This also ensures public confidence and protects shareholders. Besides, it deters further breach and compels compliance.[li]

It should be noted that having well drafted laws in our statutes solves only a part of the problem. For such laws to have meaningful impact, they must be accompanied by an effective and efficient enforcement regime.[lii] This is confirmed by Loose and others,[liii] that 'a duty is only as useful as its enforcement.' This view also finds support in Irene's[liv] assertion that enactment of laws accounts for only five percent of the job while ensuring compliance makes up the remaining 95 per cent. Statutory provisions and sanctions whether civil or criminal need to be enforced. It is this fear that compels compliance. This is particularly true of criminal sanctions. Some academic writers aver that nothing induces company officials to comply with rules and regulations, as the fear of going to prison.[lv] When sanctions are backed up by an effective enforcement regime, it creates the much-needed incentive in the minds of company directors and managers to avoid wrongdoing. This is what drives compliance and good governance.

It is sometimes argued that market reactions and societal norms are capable of acting as alternatives to conscious enforcement and so can promote responsible governance.[lvi] This work however is of the view that it is absolutely necessary to exert some form of formal enforcement on directors otherwise they will develop impetus for breach and poor governance. Both formal and informal enforcement mechanisms are complementary and should be used as such. According to Tomasic[lvii], effective enforcement is more crucial than having an elegant and comprehensive company statute.

The need to control the activities of directors is born from the company's structure at incorporation. It is only strict legislation coupled with proper enforcement strategies and deterring punishment that can inhibit powerful insiders like directors from taking advantage of their positions at the expense of the company and other stakeholders. The aim of enforcement and punishment for breach is to deter and inhibit further wrong doing. It is not to forbid or stifle the enterprising commercial spirit of directors, which is needed to assist the company, but to promote public confidence in companies. Public confidence is what drives the stock market. However, it is being suggested that there is need to be careful so that enforcement procedures

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do not lead to an overkill as every breach does not necessarily result in harm to the company.[lviii] Inasmuch as one may agree that overzealous punishments may encourage premature resignation or reluctance by suitably persons to serve, the requirements of s. 303 are clear, that is, either proper declaration or be punished for non-declaration.

Self-dealing by directors constantly comes under scrutiny because it is one easy way directors can easily whittle away company's wealth. This is why some scholars like Enriques[lix] advocates an outright prohibition irrespective of fairness, while Criddle[lx] prefers a more pragmatic approach which should allow it if it is fair and beneficial to the company. This work holds that the later preference can easily be abused by directors as it will open a floodgate for breach, while an outright ban will have the effect of precluding the company from gaining from advantageous transactions. Section 303, in the opinion of this writer, regulates self-dealing by Nigerian directors. The regulated rule adopted by s. 303 is expected to make compliance easier than an outright ban. However, the fines provided for breach of the provision may hinder compliance. Meagre fines conduce breach, as directors tend to ignore regulations whose fines they can easily pay while smiling home with their loot. If the gains from self-dealing far outweighs the fines, this will encourage an interested director to go through with the transaction and pay the fine later.

Fines can only be paid after pronouncements by the courts. In Nigeria, getting justice is a slow and winding process and may not even come in one's lifetime.[lxi] Delays in court processes are common place and are hinged on several factors like undue adjournments and failure to produce accused persons from prison or police custody on time. It is expensive to approach the courts and so shareholders are reluctant to ventilate their grievances in court. The Nigerian judiciary is still at a rudimentary stage. The fact that judges still record proceedings manually contributes to the slow pace of dispensation of cases. This led Quadri,[lxii] a senior advocate of Nigeria, to advocate for a digital and a technologically advanced judicial system that will precipitate better service delivery and quick dispensation of justice. This will in turn guarantee decongestion of courts. The senior advocate also identified the analogue and archaic system as being responsible for crowded courts and prisons in Nigeria. The courts on their part are riddled with problems like poor facilities and inadequate personnel. This prompted the House of Representatives in January 2020 to come up with a bill to fix a time limit for dispensation of cases by courts. This bill seeks to amend the 1999 Nigerian Constitution so that cases could be

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dispensed within 270 days or 9 months from date of filling. Members of the house of representatives noted that the snail-like pace of justice delivery causes hopelessness in litigants[lxiii]. It is the considered opinion of this writer that the fortunes of the courts and justice dispensation will not improve if judiciary autonomy is not granted. This will fast-track modernisation of its operations. The House of Representatives should first ensure judicial autonomy, otherwise, the passage of the bill may be an exercise in futility. This will also put an end to regular industrial actions by judiciary workers over poor conditions of service which have contributed to clogging the wheel of justice[lxiv]. The success of s. 303 and its ability to achieve the desired goals is most likely to be hampered by these challenges. If company stakeholders do not have faith in getting justice on time, they will shy aware from attempting to question wrong doing by directors.

Section 303 will also be confronted by myriads of problems which had impeded other provisions before it and prevented them from achieving set goals. In Nigeria, information asymmetry is rife within corporate organisations. This creates information monopoly with the board, thus leaving the shareholder uninformed and ignorant of happenings in the company. So, if directors refuse, neglect to sue or compromise with their colleague, how will the shareholders know so as to initiate a derivative action under s. 343 of CAMA 2020? This is worsened by shareholders' apathy. Disinterested and ill-informed shareholders are weak links in the corporate governance chain. Nigerian shareholders are apathetical about attending annual general meetings. This may be as a result of ignorance of the powers inherent in such meetings, the venue of the meetings and the cost of attending them[lxv].

Allied to the above is the issue of weak regulatory institutions. According to Adeyemi[lxvi], bank failures in Nigeria were partly as a result of failure of supervisory agencies to perform their functions. Monitoring of compliance with the provisions of CAMA is expected to be done by the Corporate Affairs Commission (CAC)[lxvii], However, the CAC appear to be incapable of shouldering this gargantuan task in an era where technological sophistication may help in covering up fraud.

Generally, where the system is weak, directors are able to go free with wrong doing unchallenged, that is why Nigeria seems to rely on the Economic and Financial Crimes Commission (EFCC) to arrest and prosecute company directors under the EFCC Act as

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perpetrators of economic crimes. Thus, a director who has unjustly enriched himself by breaching the provisions of s. 303 is most likely to be prosecuted under the EFCC Act than under the provisions of CAMA, thereby taking us to where we were before the enactment of CAMA 2020. This is because the penalties under s.303 are not punitive enough and not capable of recovering the ill-gotten wealth[lxviii]. Commenting on strict liability on issues like this in trust law, Lagbein[lxix], expressed that what makes doctrines like this tolerable is that their barks have always been more than their bite. In view of the problems outlined above, we sadly conclude that this is most likely to be the travail of s.303 of CAMA 2020. Lagbein's opinion is supported by Ekpo[lxx] who asserts that laws serve no practical purpose without enforcement and that CAMA's provisions seem to be observed more in breach than in compliance. The author decried CAMA's provisions and sanctions as being mere paper tigers and toothless bull-dogs for lack of enforcement and punishment for breach. Unfortunately, this position and attitudes are yet to change noticeably and so, the new provision is most likely to inherit this languorous disposition.

CONCLUSION

This article set out to ascertain the nature, utility and functionality of s.303 of CAMA within the Nigerian corporate, legislative and regulatory framework in a bid to discover if its fortunes will be better than that of its forerunner, s. 277 of CAMA 2004. In attempting to do so, it rummaged the provisions of the section and exposed its novel strides.

The paper notes that the Nigerian regulatory system is weak and weak systems are susceptible to directors' easy manipulations and that such systems are incapable of checking abuses within companies. The utilitarian value of the provision can only be achieved within a strong regulatory system where all the stakeholders are ready and willing to play their parts. Nigerian shareholders are apathetical and care very little about what happens in their companies. This, coupled with information asymmetry creates ignorant shareholders who are unable to question wrong doing by directors. This tends to fuel directors' impetus for breach.

The Corporate Affairs Commission has been unable to live up to its mandate of ensuring compliance with the provisions of the previous CAMA and it is not likely to fare differently

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because it is still bedevilled by the same problems which prevented it from functioning well. Moreover, directors' attitude to conforming is not likely to be significantly different because the penalties are not severe enough to compel compliance. Meagre penalties also discourage enforcement and it is the fear of enforcement that compels compliance. The work also concludes that when sanctions are backed by effective enforcement regime, it creates the needed incentives in the minds of company directors to avoid wrong doing. Enforcement will also be hampered by the analogue and lanquid nature of achieving justice in Nigeria. With all these problems which stifled s. 277 of CAMA 2004 still existing and prevalent, the fortunes of s. 303 despite its novel strides is not likely to be different.

RECOMMENDATIONS

In view of the discussions above, this paper recommends thus;

- The section should first prohibit self-dealing, before providing a cleansing device.
- The section should define the phrase 'interested director' for easy identification.
- The section should also make provision for some short-term prison incarceration to encourage compliance.
- The Corporate Affairs Commission should be better funded and equipped to meet emerging challenges.
- An interested director who has declared his interest to the board should categorically be barred from taking part in the meeting where the matter is discussed.
- The federal high court which is saddled with hearing matters emanating from CAMA should be modernised and manned by technologically savvy personnel.
- More federal high courts should be created so as to decongest existing ones.
- There should be conscious shareholder education, especially on the existence of this section, as knowledge is power.
- There is need to empower the judiciary in Nigeria by granting it autonomy as provided by the Nigerian Constitution.

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ENDNOTES

[i]Hereinafter referred to as CAMA 2020
[ii] S. 265
[iii] S. 238.
[iv] S. 240.
[v] World Bank, "Ease of Doing Business Index (I=most friendly regulations) – Nigeria", <http://data.worldbank.org >. This is a 2019 ranking. Accessed 31st July 2022.
[vi] S. 306.
[vii] Coley v. Eskaton (2020) CalRpt,3d, 20cal, 6832.
[viii] Merriam Webster, https://www.merriam-wbster.com Accessed, 31st July 2022.
[ix] See generally, J.O. Orojo, Company Law and Practice (5th ed, Butterworths, 200) 3.
[x] See for instance, ss. 279-283 of Companies and Allied Matters Act 2004, Cap 59 L.F.N., which was the amended version of the Companies and Allied Matters Decree 1990.
[xi] B.S. Black, "The principal Fiduciary Duties of Boards of Directors" (2001) Paper presented at third Asian Roundtable on Corporate Governance, (http://org/daf/ca/corporategovernaceprinciples) Accessed 31st July 2022.
[xii] Paul P. Davies and others, *Gower and Davies' Principles of Modern Company Law*, (8th ed. Sweet & Maxwell. London, 2008) 495.
[xiii] Charitable Corporation v. Sutton (1742) 2Atk. 400, 2b, Eng. Rep. 642.
[xiv] Davies, and others, n.10, 495-496.
[xv] Andrew Hicks and S. H. Goo, *Cases and Materials on Company Law* (Blackstone Press Ltd., London, 1994) 263.
[xvi] L. S. Sealy, 'The Director as Trustee' [1967] CLO 83, cited in Hicks and Goo, n. 14, 262.
[xvii] [1742] 2 Atk. 400.
[xviii] *Mills v. Mills* [1938] 1 Ch. 77. See also, *Hogg v. Cramphorn Ltd* [1966] 3 All ER 420, *Tika Tore Press Ltd & ors v Abina & Ors* [1973] NCLR 24.
[xix] See for instance, *Ferguson v. Wilson* [1866] 2 L.R. (Ch. App) and Lord Selborne L.C. in *Great Eastern Railway Co. v Turner* [1872] 8 L.R. (Ch) 149
[xx] [1854] 1 Macq 461. See also, Okeowo v.Migliore (1979) 11 SC 133.
[xxi] *Parkers v. Mckenna* [1874] 10 Ch. App. 96.
[xxii] [1977] Ch. 106.
[xxiii] See for instance, Lord Megary V.C, in *Tito v. Waddel* (No.2) [1977] ch. 106, where he held that; "if a trustee purchases trust property, any beneficiary can set it aside however fair the transaction"
[xxiv] F.A. Gervurtz, 'The Historical Origins of the Corporate Board of Directors' [2004] (33)(1) Art.3.*Hoftra Law Rev*. http://scholarlycommons.Law.hoftra.edu.hlr> Accessed, 31st July, 2022.
[xxv] Gevurtz n 23, 115.
[xxvi] The merchant adventures which were trading companies later evolved into Joint Stock Companies.
[xxvii] Andrew Keay, 'The Duty to Promote the Success of The Company' (2009) http://www.law.leads.ac.uk> Accessed 1st August, 2022.
[xxviii] See for instance, *Ferguson v. Wilson* (1866) 2LR 77 at 89-90 (Ch. App.) and *Ernest v. Nicholls* (1857) 6(HL Cas) 401.
[xxix] S. 269 (3), see also, *Longe v. F.B.N. Plc* (2010) 6NWLR (pt. 118).
[xxx] See for instance, Re A company No. 005009 (1989) BCLC 13.
[xxxi] See the report of the 1987 Law Reform Commission on the Reform of the Nigerian Company Law, (1987) 154 cited in Olusola A. Akinpelu, Corporate Governance Framework in Nigeria; An International Review, (2012), 209, https://www.amazon.com > Accessed 1st August, 2022.
[xxxii] Batraco Ltd v. Spring Bank Ltd (2015) 5NWLR (pt. 451) 109, FBN v. Banjo (2015) 5 NWLR (pt.1452) 253, Okolo v. Union Bank of Nig. Ltd. (2014) All FWLR (pt. 197) 981.
[xxxiii] (2006) 2 EFCLR.
[xxxiv] S. 277(3).
[xxxv] (1726) 2 Eqs. Cas. Abr. 741.
[xxxvi] 243 NY 439, 443.
[xxxvii] [1873] 42 L.J. Ch. 644.
[xxxviii] See, *Le Panavision v. Les Lighting* [1991] BCLC 575, [1992] BCLC 22, where the Court of Appeal and the court of first instance disagreed on the issue. See also, *re: Neptune (Vehicle Washing Equipment) Ltd*. [1995] 1 BCLC 352, where disclosure was held to be unnecessary since the facts were already known to the directors.
[xxxix] [2004]1BCLC 131.
[xl] [1999] 2 BCLC 203.

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[xli] [1994] 14 ACSL 109.
[xlii] *Centofanti v. Eekimitor Pty Ltd* [1995] 13 ACLC 315.
[xliii] [1854] 1 Macq. H. L. 461.
[xliv] Luca Enriques, 'The Law on Company Directors' Self -Dealing: A Comparative Analysis' (2000) *Int. & Comparrative Law Journal*, (2) (3),304, Kluwer Law Int. Accessed from SSRN Electronic Journal 2 DO/:10.2139/SSRM.135674 researchgate.net. Accessed 10th August 2022.
[xlv] Stephen D. Girvin and Others, *Charlesworth's Company Law*, (18th edn, Sweet & Maxwell, London, 2011) 365.
[xlvi] S. 302 of CAMA.
[xlvii] See s. 310 for the definition of requisite value and s. 312(8) for a definition of those deemed connected to others for this purpose.
[xlviii] Andrew Tuch, 'Self- Dealing in a Comparative Light' (2020) Harvard Law Sch. Forum on Corporate Governance, <https: corpgov.law.edu>. Accessed 15th August, 2022.
[xlix] *Stone v. Rutler,* 911 A. 2d 362, 367 Del [2006] where the court held that there must exist a known duty and an intentional breach of that duty before a company director can be held liable.
[l] N. Young, 'Has Directors' Liability Gone Too Far or Not Far Enough? A Review of the Standard of Conduct Required of Directors under Sections 180-184 of the Corporations Act', (2008) 26 *CSLJ*, 216,217, <http://livepages.thom.sonreuters.com.au> Accessed 17th August, 2022.
[li] J. Coffee and D. Schwartz, 'The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislature Reform' (1981) 81 *Columbia Law Review*, 261, 305 cited in A. Keay 'Public Enforcement of Directors' Duties', (2012) <http://law.leads.ac.uk/assets/files/research/ablp/>. Accessed, 17th August 2022.
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[liv] Irene' 'Codes of Conduct for Transnational Corporations; An Overview', (1998) <http://cleanclothes.org> Accessed, 18th August, 2022.
[lv] M. Hertz, 'Structures of Environmental Criminal Enforcement'. (2011) 7 (3) *Fordham Env. Law Rev*, <http://ir/lawnet.fordham.edu/cgi /viewcontentcgi/article> Accessed, 20th August 2022, see also, Webster. L. Hubbell at EPA's Criminal Enforcement Program; Hearing before the sub-committee on Energy and Commerce, (1993)103d, Cong, 1st Sess. 173; cited in Hertz, 684.
[lvi] F.H. Easterbook and D. R. Fishel, 'The Economic Structure of Corporate Law' (1991) cited in R.M. Jones & M. Welsh, 'Towards a Public Enforcement Model for Directors' Duty of Oversight', (2012) 45 (2) *Vanderbilt Journal of Transnational Law*, 343-403, <http://lawdigital.commons.bc.ed/lsfp> Accessed, 20th August 2022.
[lvii] Tomasic, n 52, 2.
[lviii] Luca Enriques, 'The Law on Company Directors' Self -Dealing: A Comparative Analysis' (2000) *Int. & Comparrative Law Journal,* (2) (3) Kluwer Law Int. Accessed from SSRN Electronic Journal 2 DO/:10.2139/SSRM.135674 researchgate.net. Accessed 2nd September 2022.
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[lxi] O. I. Aladesola and ors , 'Major Impediments To Quick dispensation Of Justice in Nigeria', (2015) *Journal of Comp. Eng. & Info Tech,* (4)(1) < https://www.researchgate net>. Accessed 2nd September, 2022.
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[lxiii] Tony Akowe, 'Bill for Faster Dispensation of Justice Scales Second Reading,' *The Nation,*11th Dec 2020, <httsp://thenationonline.ng> Accessed, 10th September, 2022.
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[lxvii] S. 8 of CAMA 2020 which gives the CAC powers to conduct investigations into the affairs of companies and to monitor compliance with the provisions of the Act.

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[lxviii] See for instance, Segun Kisali, 'Former Bank PHB MD Jailed Six Years over 25.7 bn Fraud, Wife Acquitted', *Nigerian Tribune* 16th June 2021, < https:// cdn.ampproject.org>. Accessed, 17th September 2022. Here the MD was asked by the court to refund the amount held to be illegally acquired.

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[lxx] Mokutima Ekpo and Eni Alobo, 'Nigerian Companies and the Prohibition on Political Donations: A Paradigmatic Shift as a Panacea for Compliance', (2018) 4.12.1, p. 786,790. <https://dx.doi.org/10.22161/ijaems4.12.1> Accessed, 17th September, 2022.

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