THE USE OF LAW FOR THE COORDINATION OF CORPORATE GOVERNANCE AND CORPORATE SOCIAL RESPONSIBILITY

By

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ABSTRACT

The primary objective of a limited liability company is profit maximization. So, it appears contradictory that company will be required to use part of its profits to service outside interests. However, servicing such interests proves beneficial overall due to, among other reasons, the public image of the company. Hence, the modern company integrates into its corporate policy, issues of social services. The corporate governance structure of a company is based on the activities of shareholders in general meeting, the board of directors and other principal officers such as the company secretary and the auditor. In the particular case of auditors, it is argued that the present state of the law which limits the liability of the auditor to only the company and its members is unsatisfactory. The argument is that where an audit report influences a potential investor to invest in a company and he sustains loss, there is no reason such auditor should not be liable to the prospective investor. So, a case is made in this paper to widen the scope of liability of the company auditor. The central theme of this paper is corporate governance and social responsibility. Attempt is made to examine the provision of the Companies and Allied Matters Act, 2004 (CAMA) which is the major statute regulating corporate governance in Nigeria, and case law to discuss the issues at stake.

Keywords: Company, corporate governance, shareholders, directors

INTRODUCTION

A company is an artificial[1] entity, so its activities must be carried out by human beings[2]. These human beings are the members (shareholders)[3] in general meeting and the board of directors[4]. The body of shareholders and the board of directors constitute the principal organs of the company.

By the provisions of section 63 of CAMA, corporate powers are distributed between the shareholders in general meeting, the board of directors and other officers. The board of directors can delegate all or any of their powers to a managing director[5]. Where all powers of the board of directors are delegated to the managing director, the latter may be regarded as the third organ[6] of the company ranking after the shareholders in general meeting and the board of directors. Other corporate officers who play crucial roles in corporate governance include the company secretary and the auditor.

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1 Fiction theory of a corporation takes the view that the corporation is a legal person (which is artificial) rather than a national one.

2 See *Lenard's Carrying Co. v. Asiatic Petroleum Co. Ltd.* (1915) A. C. 705

3 This is in conformity with the aggregate theory which laid emphasis on the identity of the individuals who associated to form the company.

4 Corporate realism is the theory that considered the company to have 'real' separate existence from its shareholders.

5 CAMA, s.64(b)

6 Professor Gower says as follows: "… the directors are in effect authorised to substitute a managing director for themselves as one of the organs of the company". See Gower Gower's Principles of Modern Company Law, 4th ed (London: Sweet & Maxwell, 1979) p.141. And in the Rhodesian case of *Moresby White v. Rangeland Ltd* (1982)(4) S. A. 285, Tredgold, C. J., observed that "a fully accredited managing director acting in that capacity, acts as the company itself, just as the board so acts, and could not properly be described as the servant of the company.

Therefore, the principal parties in corporate governance are: the members (shareholders) in general meeting, the board of directors, the managing director, the company secretary, and the auditor.

In the sphere of corporate social responsibility, it is noted that the primary purpose of the company is profit maximization. However, this must be done within the limits of the law. Thus, companies engage in activities which are incidental to the primary purpose of their formation. Companies, therefore, accommodate third-party stakeholders' interests in their operations. Such interests include employees' welfare, customers incentives, award of scholarships and other educational programmes, provision of electricity, water, road, healthcare, and corporate gifts. Companies which render the above services are said to be socially responsible.

The respective roles of the parties in corporate governance together with the mechanisms of social responsibility are examined in this paper using statute and case law.

ANGLES OF CORPORATE GOVERNANCE

1. Governance by Shareholders

The corporation is managed directly or indirectly by its shareholders. The shareholders' management of the corporation is through corporate meetings. However, corporate actions by shareholders can be taken without holding a meeting[7]. Basically, shareholders' meetings are classified into statutory[8], annual[9] general and extra-ordinary[10] meetings. These three types of meetings are fountain of all powers of a company except those powers which the law or the articles vests in other organs such as the board of directors[11]. The meetings also constitute the 'parliament' of the company[12].

Elaborate rules are made in the CAMA for the conduct of the meetings and in what circumstances they should be called and the type of business each of them may transact. Accordingly, rules are made for the length of notices, proceedings at meetings, quorum, minutes, and resolutions. Failure to comply with the rules of a meeting would render whatever decision taken at the meeting void. Thus, in *National Palm Produce Association Nig. GTE v. Udom*[13], the Court of Appeal held that meetings of a company held without the mandatory 21 days' notice accompanied with the agenda as prescribed in the memorandum and articles of association of the company are invalid.

There is justification for the wide powers of the shareholders in general meeting because it ensures that their investments are protected against mismanagement. Thus, powers over vital matters to shareholders' interests and which could be abused by directors, are retained by the general meeting.

Since management powers are given to the board of directors and in practice the directors may exercise all powers that are not reserved to the general meeting, the likelihood of conflict cannot be ruled out in the exercise of *concurrent* powers by the shareholders and the board of directors. In such a situation, the motive of the directors may be probed. The consequence of bad motive helps the shareholders in general meeting to assess the management. According to Badaiki, it is the point at which the shareholders can decipher the improper motive behind an act of the board that general meeting assumes its rightful place in corporate management[14].

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[7] See the American Bar Association Model Business Corporation Act. s.145. See also CAMA, s.217(2)
[8] CAMA, S.211
[9] s.213
[10] s.215
[11] Badaiki, A. D., *Corporate Law Shareholders' Control of Corporate Management in Nigeria*. (Germany LAP Lambert Academic Pub. 215) p.363
[12] Emiola, A., *Nigerian Company Law*. (Ogbomosho: Emiola Pub. 2007) p.371
[13] (2014) 8 NWLR (Pt.1410) p.479 C.A.
[14] Badaiki, supra n.11

(a) Express Powers of the General Meeting

The general meeting has express power to appoint[15] and remove[16] directors. The main way there can be control of the exercise of management powers by directors (apart from alteration of articles and refusal to ratify *ultra vires* acts of the board) is to refuse to re-elect erring directors at the general meeting or remove them altogether[17]. If management powers are vested by the articles in the board of directors, the shareholders cannot override or usurp these powers. The easiest way to curb such powers is to alter the articles[18] in general meeting. In *Gramophone & Typewriter Co. v. Stanley*[19], Bukley, L. J. stated, that the only way shareholders can dispossess directors of their control of business of the company is through the statutory majority which can alter the articles.

Other powers expressly reserved to the general meeting include alteration of the memorandum of association, for example, change of name of the company[20] and alteration of objects[21], increase[22] and reduction of capital,[23] alteration of share capital by consolidation[24], power to issue shares[25] and at a discount[26], power of conservation and re-registration of companies[27], power to convert paid-up shares into stock and reconvert any stock into paid-up shares by ordinary resolution of the company in general meeting[28], creation of reserve, liability[29]. There is the shareholders' authority to allot shares, but this may be delegated to the directors that may be imposed by the articles or from time to time by the company in general meeting[30]. The general meeting is vested with the power to remove the secretary of a public company where the ground on which he is to be removed is one other than fraud or serious misconduct[31].

By section 379 of CAMA, the general meeting is vested with the power to declare dividends in respect of any year or other period only on the recommendation of the directors. The shareholders can decrease the dividend recommended by the directors, but they cannot increase it. It has been suggested that there should be a policy to permit shareholders to increase dividends recommended by directors because the shareholder is primarily an investor[32].

The shareholders also have express powers to appoint auditors and the audit committee. The shareholders in general meeting play a vital role where a company proposes to enter into a scheme of arrangement[33], or a compromise with its creditors, or undertakes a reconstruction. Management of a company can abuse a scheme of arrangement. To avoid that, the law lays down procedures which must be followed if any scheme is to be valid.

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[15] CAMA, s.247
[16] s.262
[17] See Greer, L. J. in *Shaw (John) & Sons Saltore Ltd. v. Shaw* (1935) All E.R. 456; 464; (1935) 2KB 113. See also Goldberg, G. D. "Article 80 of Table; The Companies Act of 1948" (1970) 33 MLR 177
[18] CAMA, s.48
[19] (1908) 2 KB 89
[20] CAMA, s.31
[21] s.46(1)
[22] s.102
[23] ss.105-106
[24] ss.100-101
[25] s.117
[26] s.121
[27] ss.50-53
[28] s.150(2)
[29] s.134
[30] s.124
[31] s.296(3)
[32] Badaiki, A. D. supra ns.11, 14
[33] See CAMA, s.537 for definition of 'arrangement'.

The additional powers of the shareholders include the powers of applying to the Corporate Affairs Commission (CAC) for investigation of the company[34], of requisitioning of meetings[35], circulation of members' resolutions[36], and instituting an action in the name of the company under the rule in *Foss v. Harbottle*[37]. Under section 299 of CAMA, only the company can sue to remedy any wrong done to it. The powers to institute action may be exercisable by the general meeting if the company expresses its desire to sue by an ordinary resolution in general meeting, especially where the board defaults.[38]

(b) Ultimate Powers Exercised by General Meeting

(i) Reversion of management powers in board of directors to shareholders in general meeting

One of the occasions when the general meeting will exercise ultimate control is where the management power granted to the board of directors by CAMA is relegated or abandoned. The general meeting was held to have rightly acted on behalf of the directors who were disqualified from exercising management powers conferred upon them by the articles[39]. In cases where there is deadlock and the directors are in default, the body of shareholders needs exercise its ultimate control.

In *Barron v. Potter*[40], the articles of a company empowered the two directors constituting the board of directors to appoint a person as an additional director. One of the directors refused to attend board meeting and subsequent attempt to convene one proved a deadlock. Warrington, J. held that the general body of shareholders could exercise its ultimate control to appoint the additional director.

A further level of shareholders' power is the power to appoint the first auditors at a general meeting where the directors fail to make the appointment. When the shareholders exercise this ultimate power, the powers of directors to make the appointment shall cease[41].

(ii) Ratification of action by the directors

A veritable area where the shareholders in general meeting bring to play the exercise of their ultimate power is ratification of actions of directors. With the changes of the business environment in which directors operate the company, commercial necessity would always demand that directors take some decisions, some of which may be *ultra vires* their power and without first getting approval of the general meeting. It can be compelling to take such decisions, especially when the next annual general meeting is a long way to come and no extra-ordinary general meeting can be called. In such a situation ratification of directors' decisions by the shareholders becomes imperative.

(iii) Power to sell or consent to the board of directors to sell property of the company.

Another aspect of directors' power of management, which can easily be abused is the power to sell property of the company without consent of the shareholders. If such powers were to be exercised by

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[34] s.314(2)(c)

[35] s.215(2)

[36] s.235

[37] (1843) 2 Hare, 461, 67 E.R. 189 The rule in *Foss v Harbortlle (*also known as the majority rule or proper claimant rule*)* states that: (i) the proper claimants in an action for wrong alleged to have been done to the company is the company itself (The proper plaintiff principle) and (ii) if the alleged wrong is a matter which it is competent for the company to settle itself (the internal management principle) or in the case of an irregularity to rectify or condone by its own internal procedure (the irregularity principle), then, no individual member may bring action. The rule is statutorily provided for in S 299 of CAMA while the exceptions to the rule are provided for in S 300

[38] As a matter of law, experience and practice, it is the directors that determine whether to institute legal proceedings in the name of the company, for the conferment of management powers on the directors include the power to institute legal action.

[39] *Foster v. Foster* (1916) 1 Ch.532. See CAMA, s.63(5)(a)

[40] (1914) 1 Ch.895

[41] CAMA, s.357(3) & (5)(b)

the directors in all cases without restraint, or without the consent of the general meeting, directors were apt to sell to themselves or close relatives or at an undervalue, and no measures exist to prohibit them if they disclosed their interest. That may be detrimental to the company. That was why *Wilson v. Miers*[42] established the need to have the consent of the shareholders before the board of directors can sell company's property.

(iv) Power to approve director's contract of employment for more than five years

Under section 291(3) of CAMA, shareholders in general meeting may approve a director's contract of employment with the company for more than five years.

(v) Corporate gifts

The shareholders may authorize the making of gratuitous contributions out of the company's fund. But the exercise of such powers must be reasonably incidental to the company's business and for the benefit of the company. However, contributions to political parties in Nigeria is prohibited[43].

2. Governance by Directors

The statement by Viscount Haldane in *Lennard's Carrying Co. Ltd. v. Asiatic Pet. Co. Ltd*[44]. that a corporation is an abstraction without a mind of its own brings to focus the practical problems attendant on the strict application of the doctrine of legal personality in corporate management. That doctrine postulates that a company is an artificial person (fiction theory) quite independent of its members[45]. It therefore, becomes expedient and inescapable that a mechanism must be developed whereby expression can be given to the will of the corporation. That mechanism is the board of directors[46], that is, the real people behind the company (realist theory).

Nigerian company law requires that every company must have at least two directors[47], who must be suitably qualified[48]. The board is the pivot on which the authority for the day-to-day management of the business of the company revolves. It is the executive organ of the company. As a rule, the directors must act as a board.

The board, by section 63(3) of CAMA, can exercise all powers of the company, except those which the articles require to be exercised by the members in general meeting. The directors' power of the day-to-day management of the business of the company is exclusive and absolute, unless it is curtailed by the articles. The court will not interfere with the board's discretion in the absence of illegal conduct or fraud harming the rights of creditors, shareholders, or the corporation. In this regard, the board of directors may enter into any contract or transaction necessary to carry out the business for which the corporation was formed. The board may appoint officers and agents to act for the company or it may delegate authority, to one or more of its members to do so[49].

In exercising their powers conferred on them by the articles, the board of directors shall not be bound to obey the directions or instructions of the members in general meeting. Therefore, members cannot by a resolution passed by a majority or even unanimously supersede the directors' powers[50], instruct

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[42] (1861) OGBNS 348, ER 486 cited in Badaiki, supra
[43] CAMA, s.38(2)
[44] (1915) AC 705, 713
[45] See *Salomon v. Salomon & Co. Ltd*. (1897) AC 22
[46] See *Ferguson v. Wilson* (1860) L.R. Ch.77 per Carins L. J. at 89
[47] CAMA, s.246
[48] s.257
[49] s.63(4)
[50] *Scott v. Scott*. 1 All ER 582 where a resolution of a general meeting that the company's auditor should investigate the conduct of its affairs by the directors was held void. Compare the similar American case of *Charles Town Boot & Shoe Co. v. Dunsmore* (1880) 68 NH85, where a resolution of a general meeting appointing a committee of members to supervise the directors was held void.

them how they shall exercise their powers. This sovereignty of directors within the limits of the powers conferred on them by the articles was clearly expressed by Greer L. J. in the following words:

> A company is an entity distinct alike from its shareholders and directors. Some of its powers may, according to the articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise those powers. The only way in which the general body of shareholders can control the exercise of powers vested in the articles in the directors is by altering the articles, or if the opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which, by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders[51].

So, the general meeting can only retain its ultimate control by amending the articles or removing directors and substituting others to its taste. But until it takes one or other of these steps, the directors can disregard the wishes and instructions of the members in all matters not specifically reserved (either by the Act or articles) to the general meeting.

The court is not inclined to treat managerial (shareholders) and executive (directors) power as concurrent. Unless the articles provide otherwise, they are to be exercised exclusively by the directors. Thus, the directors power to sell[52] or to retain[53] any of the company's assets (including its whole undertaking), their power to appoint one or more of their members to be managing director or directors[54], their power to declare dividends[55] and their power to sue in the company's name[56] have been treated as exclusive to them, and so resolutions passed by members which conflict with the decisions of the directors in respect of such matters are ineffective[57].

DUTIES AND LIABILITIES OF DIRECTORS

The first business of a public company is to call the statutory meeting as required under section 211 of CAMA. Apart from this inaugural meeting of a public company, the primary responsibility of directors is the management of the company[58]. Incident in the management of the company by the directors are the following duties:

(a) Allotment of Shares

It is the duty of directors to allot and transfer shares. In *Tika-tore Press Ltd & ors v. Ajibade Abina & ors*[59] the Supreme Court took the view that the directors are the only competent authority of the company to make allotment of shares. But the tenor of section 124 of CAMA underlies the overriding authority of the company in which the power to allot shares is now vested, though it is provided further that such power may be delegated to the directors, subject to any conditions imposed in the

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[51] *John Shaw & Sons (Salford) Ltd. v. Shaw* (1935) 2KB 113, 134. But note the circumstances in which the members could assume directors' functions as listed in s.63(4).

[52] *Quin and Axtens Ltd. v. Salmon* (1909) AC 442

[53] *Automatic Self-Cleansing Filter Syndicate Ltd. v. Cunninghame* (1906) 2 Ch.34

[54] *Thomas Logam Ltd. v. Davis* (1911) 104 LT 914

[55] *Scott v. Scott*. supra

[56] *John Shaw & Sons (Salford) Ltd. v. Shaw*. supra

[57] See *Mercantile Bank of India v. Central Bank of India* (1938) AC 287; (1938) 1 All ER 52

[58] In O*kpella Cement Co. Ltd. v. Igiekhume* (1979) 1 FCR 64, Agbaje, JCA (as he then was) said "… only the directors and not the company's general meeting is the legally competent body to manage the business of the company."

[59] (1973) 1 All NLR 244

articles or by the general meeting. Directors must, therefore, observe restrictions[60] that may be imposed on the allotment or transfer of shares.

(b) Publication of Annual Financial Statement

The responsibility for publishing the annual financial statement of the company – the balance sheet and profit and loss accounts – and declaration of dividends is placed directly on the directors[61].

(c) Other Ministerial Duties

There are certain ministerial duties which the law places on directors failing which they suffer individual sanctions. This is particularly important where returns are required to be made by the company to the Corporate Affairs Commission[62] in connection with the issuance of prospectus. Generally, the board performs the functions of defining which of the authorized business of which the company shall engage, sets the company's long-term objectives and strategic plans, and ensures that there is adequate machinery for implementation. It controls the company's financial policy including the approval of capital expenditure and programmes. The board also has responsibility to set guidelines for employment and lays down personnel policies, appoint senior managers, review their performances, and fix their remuneration as well as oversee the process of management development and training. It is expected of the board to monitor and evaluate performance and consider policy on corporate re-organization and reconstruction especially takeovers and mergers.

As stated before, it is the directors that are required to enter into contract on behalf of the company. It follows that where a contract is required to be made under seal[63], the directors are the appropriate organ of the company to discharge that function[64]. Thus, an official seal of the company duly affixed, or authorized to be fixed by the directors binds the company.

(d) Instituting Legal Proceedings

Perhaps one of the most important duties of directors is to initiate legal proceedings to protect corporate property. Indeed, that is the basis of the rule in *Foss v. Harbottle*[65].

FIDUCIARY DUTIES OF DIRECTORS

The list of legal but administrative duties assigned to directors is not exhaustive, only the most significant of them have been examined. But in exercising their powers, and while performing their duties, a duty of "good faith" and "degree of care, diligence and skill" which a reasonably prudent director would exercise in comparable circumstances are imposed on directors[66]. A director who cannot give continuous attention to the affairs of the company will not meet the standard of care, diligence or prudence imposed by section 282 of CAMA.

So strictly speaking, the directors' duties may be broadly classified into two. The first is the duty of trust – usually referred to by lawyers as "fiduciary duties". Section 279(1) of CAMA provides:

> 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.

The second duty is that of skill and care.

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[60] See CAMA, ss.121, 159, 161

[61] It does appear now to be settled law that whether or not to pay dividend and how much is to be paid is at the discretion of the board of directors.

[62] CAMA, ss.334, 337, 342

[63] There can be no valid execution of a document without a company's seal. See CAMA, s.71(1)

[64] s.76

[65] (1843) 2 Hare 461

[66] CAMA, s.282(1)

Acting in good faith means that a director must disclose to the company the nature and extent of his interest in or over any shares, or debentures or any contract in which he has interest[67]. And the "best interest" of the company according to section 279(3), is the faithful, diligent (and by use of ordinary care and skill), preservation of its assets to further its business and promote the purpose for which it was formed. A director who carelessly gives out loan without security does not act in the best interest of the company.

Therefore, the Supreme Court decision in *Longe v. First Bank Plc*[68] is unfortunate and disturbing. In that case, the court rather than addressing the breach of director's fiduciary duty, considered the case within the narrow compass of failure of the board to give the plaintiff-director notice of meeting when in fact the basis of his employment contract was frozen. This is a case where the plaintiff-director was on suspension for breach of his fiduciary duty imposed on him by section 279 of CAMA. It is conceded that every director is entitled to be given notice of meetings. But this right is qualified and not absolute under section 266. It is argued that the fact of the plaintiff's suspension from work disqualifies him from any right to receive notice of meeting. In any case, CAMA does not state that a director on suspension is also entitled to receive notice of meeting.

Even where the directors had acted in good faith, their action might still be questioned if they exercised their powers negligently. Negligent exercise of powers is an exercise of powers in breach of section 279(3) of CAMA. In the case of *Nidocco Ltd. v. Gbajabiamila*[69] the Supreme Court held that a chairman who is also a director of a company has a duty to act in the best interest of the company. See also *Haston (Nig) Ltd. v. A.C.B. Plc*[70].

GOVERNANCE BY MANAGING DIRECTOR

Section 64(b) of CAMA allows the board of directors to delegate all or any of their powers to a managing director. When all powers of the board are delegated to a managing director, all powers, and duties exercisable by the board will vest on the managing director, *mutatis mutandis*.

GOVERNANCE BY COMPANY SECRETARY

The office of secretary is very important in the modern company. So, every modern company, whether private or public is required to have a secretary[71]. There are differences between the secretary of a private[72] company and the secretary of a public company. The secretary of a private company does not require professional qualification for employment, while the secretary of a public company requires professional qualification before he or she is eligible for employment.[73] Furthermore, the secretary of a private company does not have job security so he or she can be removed from office with ease. But in the case of a public company, there are detailed provisions to ensure security of tenure. Thus, the secretary of a public company cannot be removed unless the procedure for his or her removal is complied with[74].

As an important officer of the company the secretary is as influential as the director. The company secretary is vested with extensive responsibilities including making representations as well as entering into contracts on its behalf which come with the day-to-day running of the company. Thus,

[67] ss.273, 275, 276, 277
[68] (2010) 6 NWLR (pt.1189) 1
[69] (2014) All FWLR (Pt.724) 1 SC
[70] (2002) FWLR (Pt.119) 1476
[71] CAMA, s.293(1)
[72] The proposed amendment bill of CAMA has dispensed with the office of secretary for a small company
[73] s.295)
[74] s.296(2)-(4)

in the performance of his or her duties, he or she is entitled to resist interference from the members, the board of directors or managing director[75].

Since the secretary is vested with certain statutory duties, he or she may be liable for default in performing those duties. Again, due to the prominent position he or she occupies, statutes creating criminal offences often make the secretary responsible for the company's crime[76].

5. GOVERNANCE BY AUDITORS

The management of corporate finance is an integral part of corporate governance. The duty imposed on directors of a company to circulate or publish the accounts of the company each calendar year is to give the members and the investing public a fair and accurate information about the financial affairs of the company. The auditor is a person who checks the accuracy of accounting records and statements and attest to them. It is generally agreed that the financial statements of a company are its bill of health. They show the annual state of the affairs of the company and they are vital and indeed, of crucial importance, not only to the members of the company, but also to third parties dealing with it. While the financial statements enable a member to know, for instance, whether his investments are growing or depreciating and whether to sell off or retain his shares in the company, they provide a potential investor with information which would either persuade him to invest or dissuade him from investing in a particular company.

It is the likely influence or impact of inaccurate financial statements on the potential investor that is of concern here. The question is: to whom is an auditor liable in the event of an inaccurate or negligently prepared financial statement? The answer to this question is found in section 368 of CAMA which provides as follows:

> 368. Liability of auditors for negligence.
> (1) A company's auditor shall in the performance of his duties, exercise all such care, diligence, and skill as is reasonably necessary in each particular circumstance.
> (2) *Where a company suffers loss or damage as a result of the failure of its auditor to discharge the fiduciary duty imposed on him by subsection (1) of this section, the auditor shall be liable for negligence and the directors may institute an action for negligence against him in court.*[77]
> (3) If the directors fail to institute an action against the auditor under subsection (2) of this section, any member may do so after the expiration of thirty days' notice to the company of his intention to institute action.

It is clear from subsection (2) of section 368 that the duty of care imposed on auditor by the statute is owed to the company and to no one else. It is argued that this provision defeats the entire essence of the audit report as a means of attracting potential investors. As it presently stands, a potential investor who is persuaded or misled by a negligently prepared financial statement to invest in a particular company may have no remedy if his investments are lost. The point made here is that liability of auditors should be extended to all those whom the auditor should have in contemplation while preparing his financial statements. The general duty of skill and care which an auditor (as a professional) owes third parties should be extended to circumstances where an innocent third-party is induced by an auditor's report to invest in a company[78].

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[75] Orojo, J. O. *Company Law and Practice in Nigeria* (Johannesburg: LexisNexis, 2008) p.290.

[76] *Pennington's Company Law*. 8th ed. (London: Oxford University Press, 2006) p.556

[77] Italics for emphasis

[78] See the following cases: *Hedley Byne & Co. Ltd. v. Heller & Partners Ltd*. (1964) AC 465; (1963) 2 All ER 575; (1963) 1 WLR 101; See also the dissenting judgment of Lord Denning in *Candler v. Crane Christmas & Co*. (1951) 1 All ER 426; (1951) 2KB 164; *Grover Industrial Holdings Ltd. v. Newman Harris & Co*. (12th January 1976, unreported); *Scott Group Ltd. v. McFarlane* (1978) 1 WLR 553; *JEF Fasteners v. Marks, Bloom & Co*. (1981) 3 All ER 289.

CORPORATE SOCIAL RESPONSIBILITY

Corporate social responsibility, according to Parkinson[79], means incurring uncompensable costs for socially desirable costs for socially mandated actions. It refers to behaviour that involves voluntarily sacrificing profits, either by incurring additional costs in the course of the company's production processes, or by making transfers to non-shareholder groups out of the surplus thereby generated, in the belief that such behaviour will have consequences superior to those flowing from a policy of pure profit maximization[80]. In the sense that it is relevant in this paper, the obligation imposed on companies to render social services to third-party stakeholders is called corporate social responsibility. The third-party stakeholders include company employees, customers, the people and communities within the constituency or jurisdiction of the company's operation.

TYPOLOGY OF CORPORATE SOCIAL RESPONSIBILITY

What kinds of behaviour are envisaged when it is said that a company acts or should act in a socially responsible way?

An appropriate starting point is to distinguish "relational responsibility" and "social activism". Relational responsibility refers to attempts to promote the welfare of groups such as employees, customers, or neighbours, who are affected by the conduct of the company's mainstream business activities. "Social activism" on the other hand, refers to conduct which is beneficial to society or particular interest groups, but which falls outside the scope of the company's ordinary commercial operations (though the conduct may nevertheless be commercially beneficial to it). Examples include, charitable donations, arts sponsorship, and certain forms of involvement in education.

The distinction is important because the two types of behaviour involve different perceptions and the role of business in the life of the community. The practice of relational responsibility involves an attempt to achieve improved accommodation for the various interest groups affected by corporate activity but does not envisage a wider social role for the company. Social activism in contrast, constitute an effort by companies to address social issues that arise independently of the way the company conducts its business and thus represents an extension of corporate activity into essentially non-commercial spheres.

Relational Responsibility

A demand for social responsibility might involve a demand that a company change its goal so that the business be run to maximize the welfare of employees or of customers, and no longer with a view to maximize shareholders wealth.

The conception of social responsibility invoked might, in contrast, require that the company recognize additional constraints while pursuing the traditional profit-maximization or profit-making objective. A company might be regarded as socially responsible on this view where managers accept an obligation to provide safe working conditions and to pay 'fair' wages. A company might also subscribe to the principle that it should not trade in a country which is guilty of oppressing a section of its population on racial or religious grounds, or that it should not deal in certain commodities such as tobacco, animal products or armaments.

[79] Parkinson, J. E., *Corporate Power and Responsibility* (New York: Oxford University Press, 1996) p.260; see also Brundney, V., "The Independent Director – Heavenly City or Potemkin Village," (1982) 95 Harv. L. Rev. 597, 605.
[80] Ibid

Social Activism

A company might, in theory, adopt as a goal, the amelioration of a social problem that exists independently of the way it conducts its business, for example, youth unemployment, urban decay, third-party poverty.

Alternatively, while it adheres to a single goal of profit maximization, it may accept that companies must comply with certain finite social obligations as an adjunct to carrying on business. Thus, the company's management may subscribe to the view that donations or other forms of social activism are an authentic moral duty that companies must discharge irrespective of whether they also serve the corporate self-interest. Companies may, on the other hand, make donations to charity or become involved in community activities in response to the perceived demands of social commerce, anticipating that failure to give or participate will have adverse effects on the company's image and public relations. More positively, company involvement may be regarded the by management as a form of advertising, with intended payback, or it may similarly be viewed as an investment in the community, by contributing to the preservation of the company's markets or the development of the skills of potential employees.

Corporate generosity is acceptable only so long as a net benefit to the company can be expected. In the words of Bowen, L. J.:

> There is a kind of charitable dealing which is for the interest of those who practice it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose … the law does not say that there are to be no cakes and ale, but there are to be no cakes and ale, except such as are required for the benefit of the company[81].

Generally, under classical company law, companies are not authorised to carry on acts of business outside of the company's main business[82]. But then, there emerged the "incidental powers" theory whereby companies are authorised to do business which are incidental to the main business of the company. In addition, companies engage in corporate services that are intended to enhance their worth, status or reputation. In other instances, companies render corporate services to avoid hostility from host communities. In the same vein, social corporate services are rendered as a matter of state policy. So, the justification for corporate social responsibility is often based on the following:

(i) Incidental powers of the company management or discretionary powers of directors.
(ii) Satisfaction of stakeholders' expectations
(iii) Corporate reputation
(iv) State policy

Each of the above is discussed below.

(i) Incidental Powers of Company Management or Discretionary Powers of Directors

The memorandum of association of companies spell out the objects of the companies. Attempts are made to widen the companies' activities by the insertion of 'incidental' objects sub-clauses in the memorandum. They often vest in the company power "to carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or ancillary to the general business of the company."[83] The court has

[81] *Hutton v. West Cork Railway Co*. (1883) 23 Ch.654, 673. CA.
[82] See *Ashbury Railway Carriage & Iron Co. v. Richie* (1875) LR 7HL653
[83] See *Cotman v. Bougham* (1918) AC 514

held that such provision entitled a company formed as an estate management business to finance a project by another company.[84]

(ii) Satisfaction of Third-Party Stakeholder Expectations

In most cases, third-party stakeholders expect companies operating in their domain to execute or render some projects or services. These include provision of access roads, electricity, water, classroom blocks, capacity building for skills acquisition training, award of scholarships, grant of soft loans, employment chances, etc. A good example is when Shell Petroleum Development Company Limited (SPDC) of Nigeria proposed to construct a road linking a block of thirteen communities in Bayelsa State. SPDC had concluded all pre-construction activities such as Environmental Impact Assessment (EIA), survey, soil test, assessment of damages, and acknowledged that the road "satisfies majority of stakeholders' expectation and enhance company reputation for fulfilling promises already made and published"[85].

(iii) Corporate Reputation

The philosophy here is to ensure that companies undertake projects to promote their corporate image.

In 2001, SPDC contributed to education in Nigeria, though, amongst others:[86]

(i) The award of scholarships for primary, secondary, and tertiary education, building, equipping, and donating school and classroom blocks to community schools and youth training schemes across the company's areas of operations.

(ii) Building and upgrading of community hospitals and health centres, disease immunization projects and campaigns cutting across the Niger Delta area and indeed other parts of the nation.

(iii) Executing and donating community water schemes and projects including public sanitation facilities.

(iv) Agricultural development through extension and advisory services, development of better yield and disease-resistant seedlings in multiplication farms and distributing same to farms, agricultural research sponsorship, running demonstration farms, fisheries, and poultry farms.

(v) Developing and donating various infrastructure projects such as roads, bridges, market stalls, civic centres, and town halls.

In 2007, Elf Petroleum Nigeria Limited (EPNL) reported that over the years, EPNL has been involved in the construction and renovation of school blocks, health centres, rehabilitation of roads, provision of electricity, portable water, and free health services as well as award of scholarships in their host communities. There are well over 400 youths of Akwa Ibom State origin who have benefited from EPNL's skill acquisition programme. As at 2006/2007 academic year, EPNL awarded a total of 1,000 post primary, 620 post-secondary, 35 annual foreign postgraduate scholarships to sons and daughters of Akwa Ibom State[87].

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[84] See *Bell Houses Ltd. v. City Wall Properties Ltd*. (1965) 3 All ER 427; (1965) 1 QB 207; *National Investment & Properties Ltd. & Ors* (1969) 1 All NLR 138; (1969) 1 NMLR 99.

[85] Kieriseiye, Damfebo. "Legal Regime of Compensation for Victims of Oil and Gas Operations in Nigeria." (Unpublished Ph.D Thesis, Ambrose Alli University, 2010) p.13

[86] SPDC: (February 2001). Sustainable Development Strategy, Revised Edition:

[87] Weekly Newspaper on Sustainable Development by Elf Petroleum Nigeria Ltd. No.5 April-June, 2007.

In a memorandum of understanding[88] (MOU) signed in 2004 between Nigerian Agip Oil Company (NAOC) and Twon-Brass Community in Brass Local Government Area of Bayela State, NAOC undertook to provide the following projects:[89]

(i) Renovation of Assembly Hall
(ii) Renovation of library and staffroom for Government Secondary School, Twon-Brass
(iii) Renovation of one 5-classroom block for Government Secondary School, Twon-Brass
(iv) Construction of 400m length of consulate-secondary school road with drains on both sides and four culverts
(v) Construction of block work perimeter fence with gate house round the general hospital, Twon-Brass
(vi) Equip Twon-Brass General Hospital, using its standard specification.

It follows from the foregoing that oil prospecting companies provided some benefits to their host communities to promote their corporate reputation and ensure conducive and peaceful atmosphere for their operations.

(iv) State Policy

In certain cases, government impose responsibility on companies to integrate into their activities measures aimed at protecting community or local interests through legislative intervention. For instance, in Nigeria, there is the Nigerian Oil and Gas Industry Content Act 2010, which requires companies dealing with oil and gas industry to accommodate local interests. The Act seeks to provide for the development of Nigerian content in the Nigerian Oil and Gas Industry, Nigerian Content Plan, supervision, coordination, monitoring and implementation of Nigerian content.

If the aim of the law is for the protection of the interests of the oil and gas producing communities, that aim is defeated because the Act applies to all Nigerians. The people from the host communities are poor and cannot effectively compete for local content jobs with people from outside the host communities.

Ghana also appears to follow the Nigerian example by making its Local Content Regulations. The Petroleum (Local Content and Local Participation) Regulations 2013, which were made pursuant to section 22 of the Petroleum Commission Act, 2011 (Act 821) of Ghana specifically provides for local content issues[90].

One area where companies demonstrate corporate social responsibility is entrepreneurship development. Companies engage in programmes aimed at entrepreneurship development – youths to develop skills that will make them achieve their life ambitions. Sterling Bank in Nigeria organized "Get Ready for Work" initiative in Lagos. The event with the theme "Mind the Gab" was organized to help participants understand what they need to make in life, whether in business or paid employment. The event was part of the bank's corporate social responsibility initiative[91].

CONCLUSION

The focus of this paper has been to examine corporate governance and responsibility using the law. The paper notes that the two principal organs for corporate governance are the shareholders in general meeting and the board of directors. It is noted that shareholders' powers are rooted in the law on general meetings. The powers are vested in shareholders by various provisions of the CAMA. Such powers, (express or ultimate), it is noted, enable shareholders instil quality into management and contribute to the protection of their investment. The powers are also calculated to ensure that

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[88] See the Memorandum of Understanding (MOU) dated 13th August, 2004 between NAOC and Twon-Brass Community.
[89] Field visits confirmed the implementation of the MOU
[90] See generally, Regs 1 and 2
[91] The Nation, Wednesday, March 30, 2016, p.13

shareholders determine the calibre of management and ensure that certain changes are effected as well as check corporate mismanagement.

The board of directors constitutes the heart of any company. Enormous powers are given to it to manage the business of the company and are thereby well-placed *de jure* and *de facto* to influence the affairs of the company. Although the board of directors are appointed by the shareholders in general meeting and the shareholders can also remove any director. The director once duly appointed enjoy a high degree of autonomy fostered by the principle that shareholders cannot interfere in the management of the company. The law gives much latitude to directors in respect of company management, and the courts uphold this non-interventionist philosophy. For instance, in *Quin and Axtens Ltd v Salmon*[92]. The directors' power to sell any of the company's assets was treated as exclusive to them, so the shareholders in a general meeting cannot interfere. Also, in *Scott v Scott*[93], the director's power to declare dividends was held to be exclusive to them.

In of corporate social responsibility, there is awareness that companies should pursue profits and give due regard to the impact of company activities on the wider society. It is, therefore, felt that while the directors manage the company on behalf of the shareholders, the interest of third-party stakeholders should also be considered. Thus, the practice whereby there is an emphasis on the purely financial aspect of the business is no longer appropriate in a society which is increasingly taking an inclusive view of business[94].

[92] (1909) AC 442

[93] (1943) 1 AER 582

[94] Akinpelu, A. O., *Corporate Governance Framework in Nigeria: An International Review* (Bloomington: Universe, Inc. 2011)p.32