ORGANS OF THE COMPANY THAT AFFECT CORPORATE WIDER RESPONSIBILITY: A REVIEW*

Abstract:
Every company has two principal organs that runs and manages its affairs – the members in general meeting and the board of directors. These two organs of the company perform various roles for the company. Depending on the provisions of the country's corporate legislation and those of the articles of association of the company concerned, the responsibility of managing the day-to-day affairs of the company is most often vested on the board. This management responsibility of the board entails, among other things, taking decisions for the company and taking necessary steps to ensure that those decisions are implemented. Many a times, the said corporate decisions and their implementations normally affect not solely the shareholders of the company but a wide range of people –usually referred to as the corporate stakeholders -such as employees of the company, its creditors, customers, local people and the environment. It therefore becomes very important that the directors should always have this very fact at the back of their minds and thus, make corporate decisions that are integrative of and would promote the interests of not their shareholders but those of these corporate non-shareholding stakeholders also. The shareholders are also enjoined to initiate and/or encourage and support such inclusive and integrative corporate approach as it is their best interests that their company is seen by the wider world as a responsive, ethical, integrative and socially responsible company The possibility of these organs of the company adopting this corporate wider stakeholders' approach and the benefits derivable therefrom, among other things, are treated in this work.

This the writer does using doctrinal methodological approach. The work concludes that it is in the interest of the company that the organs of the company should be integrative of the interests of the corporate wider stakeholders in their corporate approach.

Introduction:

This work centres mainly on corporate governance. It gives a general overview of the governance of the company through its organs – shareholders in a general meeting and the board of directors, and examines the typical functions/duties of these organs in a shareholder primacy regime which is generally the promotion and protection of the (economic) interests of the shareholders.

Organs of the Company:

A company is an artificial person,[1] an abstraction, with no substantial reality, no hands, mind or will, but which exists only

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***Eze, J.A**. (Ph. D) is the Associate Dean of Faculty of Law, ChukwuemekaOdumegwuOjukwu University, Igbariam. Phone: 07038584399. Email: aribest01@yahoo.com

[1]Being a person (distinct from its shareholders and other stakeholders) in the eyes of the law, a company can own property in its own right/name; can sue or be sued in contract, tort or any other number of causes of action; can be prosecuted and punished for criminal activities; enjoy various rights under the law and constitution of the country; and is subject to tax liability. See *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL); *Lee v Lee's Farming Ltd* (1961) AC 12 PC; Nigerian cases of *Olufosoye v Fakorede*[1992] NWLR (pt. 272) 747; *CDBI v COBEC (Nigeria) Ltd* [2004] 13 NWLR pt, 948) 376;*Marina Nominees Ltd v Federal Board of Inland Revenue*[1986] 2 NWLR (pt 20 61; *HabibNig Bank Ltd v Ochete*[2001] NWLR (pt 54) 384; South African case of *Airport Cold Storage (Pty) Ltd v Ebrahim*[2008] (2) SA 303 (c).

in the imagination of the law.[2] As an artificial entity, it becomes imperative that natural person(s) should be acting on behalf of or representing it in its day-to-day activities. These human organs or agents must, however, be authorised either expressly or impliedly to so act for their acts to be validly deemed to be those of the company. So, where it is said that a company performed an act, it certainly did it through its human agents or servants. Thus, it was noted in *Lennards Carrying Co. Ltd v Asiatic Petroleum Ltd*[3] that a company is "an abstraction. It has no mind of its own; its active and directing will must consequently be sought in the person of somebody.........who is really the directing mind and will of the corporation.......That person may be under the direction of the shareholders in general meeting, that person may be the board of directors itself."[4] It is clear from this dictum that a company has two primary organs through which it exercises its powers and

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[2] John Marshall, Chief Justice of the United States Supreme Court, remarks in *Trustees of Dartmouth College vWoodward* (17 US) 4 Wheat 518, 4 L Ed 629, at p 636 that a company is "an artificial being, invisible, intangible, and existing only in contemplation of law." Similarly, Berle and Means said that the "corporation is a distinct legal entity, separate and apart from stockholders." Berle, A. and Means G.C. (1932) *The Modern Corporation and Private Property* New Brunswick and London: Transaction Publisher, at p 221. A company becomes a legal person upon incorporation by registration – UK CA 2006, s 16. Equally, the South African Companies Act 2008, section 19(1) provides that "from the date and time that the incorporation of a company is registered.....the company is a juristic person....." See also CAMA 1990, s 37. According to CAMA, s 38, with the exception of few exemptions stipulated therein and any other exceptions contained in the company's memo or any other enactment, every company shall, upon incorporation, have "all powers of a natural person of full capacity."

[3] [1915] AC 705, at pp 713-714.

[4] See a similar statement made by Lord Denning L.J in *Bolton (Engineering) Co. Ltd v Graham & Sons*[1957] 1 Q.B. 159, at pp 172-173; NnaemekaAgu JSC in *Delta Steel (Nigeria) Ltd v American Computer Technology Inc*. [1999] 4NWLR (Pt. 597) 53, at 66.

actions, *viz*: the members in general meeting, and the board of directors.

The acts of the members in general meeting and those of the board, while carrying on in the usual way the business of the company, are treated as the acts of the company.[5] The above view is statutorily adopted by the CAMA 1990, section 63(1) which states that:

> A company shall act through its members in general meeting or its board of directors, or through officers or agents appointed by, or under authority derived from, the members in general meeting or the board of directors.

As noted above, it follows from the section that for a company to validly act through agents or officers other than its members in general meeting or the board, such agents or officers must be appointed by or derive their authority to so act from either the members in general meeting or the board, otherwise the act will not be deemed to be that of the company.[6]

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[5] See OrojoJ.O (2008) *Company Law and Practice in Nigeria*, South Africa: LexisNexis, (5th ed.), at pp 99-101.
[6] See also CAMA 1990, s. 66(1)(b).

The members in general meeting act through resolutions - which may be either ordinary[7] or special[8] resolution. The company legislation of a given jurisdiction does often specify if a particular decision of the general meeting is to be reached by ordinary or special resolution. For instance, South African Companies Act 2008, section 66(9) provides that remuneration can only be paid to the directors in accordance with a special resolution of shareholders.[9] In such a case the required resolution must be met for the act to be valid.

It is noteworthy that the authority to exercise the company's power is delegated not to the individual directors, but to the directors as a board,[10] although it may be sub-delegated to the managing director,[11] committees,[12] or to other officers.[13] There

[7] Simply put, an ordinary resolution is a resolution adopted with the approval of more than 50 per cent of the voting rights exercised on the resolution (or in case of South Africa, a higher percentage as required by the company's memorandum of incorporation (MOI)). See, CAMA 1990, s 233; UK Companies Act 2006, s 282; *Bushell v Faith [1970]* AC 1099, at p 1108. Sometimes, a special notice may be required for an ordinary resolution, for instance, for removing a director before the expiration of his period in office - see CAMA 1990, s 262(1) and (2); UK 2006 Act, s 168(1).

[8] A special resolution is one passed by at least 75 per cent of votes cast in the resolution. See CAMA 1990, s 233; UK Companies Act 2006, s 283. In Nigeria, a 21 days' notice has to be given specifying the intention to propose the resolution as a special resolution - CAMA 1990, s 233(2). As in the case of ordinary resolution, the South African Act 2008 permits the MOI to require a different percentage of voting to approve a special resolution.

[9] See UK Companies Act 2006, s 641(1) - reduction of share capital; s 21- alteration of the company's articles. Special resolution is needed in these two instances. Nigerian CAMA 1990 has similar provisions. See ss 106(2); 46.

[10] An exception to this rule is where the corporate legislation of the given country permits a one-man directorship.

[11] See, for instance, s 64 CAMA, 1990.

[12]Ibid.

[13] S 66(1)(b) CAMA. On this issue of sub-delegation in the UK, see model art 5 of both **'PCLs' and 'PLCs'**

must be an actual delegation to an individual director for him to validly claim, internally, that he has the powers of management separate from the collective board. [14] On the other hand, externally, a third party may be able to rely on the appearance of authority.[15]

Division of Powers between the Organs of the Company:
Company law in Nigeria and the UK effectively shares powers between the two principal organs of the company.[16] In Nigeria, for instance, section 63 CAMA clearly and expressly sanctions the organic theory of the acts and liabilities of the company and approves the division of power between the members in general meeting and the board of directors.

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[14]*Mitchell & Hobbs (UK) Ltd v Mills* [1996] 2 BCLC 102.

[15]This may be referred to as 'apparent or ostensible' authority. It is the kind of authority of an agent as it appears to others:*Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98, at p 102, CA. It can operate to increase/enlarge actual authority or to create authority where no actual authority exists: see*First Energy (UK) Ltd v Hungarian International Bank* Ltd [1993] BCLC 1409. It cannot, however, be relied upon where the third party knows that the agent has no actual authority or is put on inquiry as to the absence of authority: *Morris v*Kanssen [1946] 1 All ER 586, HL; *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48; *Rolled Steel Products Holdings Ltd v British Steel Corporation* [1985] 3 All ER 52; *Freemanand Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630, CA. For apparent authority to arise, the agent must have been held out by someone with actual authority: see *Re Ing (UK) Ltd v Verischerung* [2007] 1 BCLC 108, especially at p 127.

[16] In the UK, it is the company's articles that do this. Thus, in *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 34, CA, it was held that the relationship between a board and the shareholders is a contractual one based on the company's articles which determine the extent of the management powers conferred on the board. See also *Salmon v Quin & Axten Ltd* [1909] 1 Ch 311; *Howard Smith Ltd v Ampol Petroleum* Ltd [1974] AC 821, at p 837, PC; former Table A, article 70, (now article 3). There are also certain sharing of powers between the two organs in the Act itself. Certain matters are reserved to the shareholders in the statute, for instance, right to reduce the share capital: UK CA 2006, s 641; right to amend the articles: s 21.

Although the general meeting is the supreme legislative authority of the company, in most jurisdictions, the board of directors is - either by legislation[17] or by the company's constitution (as is the case in the UK)[18] - vested with the power of managing the company on behalf of the shareholders. Thus, article 3 of the UK model articles 2008 of both private companies limited by shares (PCLs) and public limited liability companies (PLCs) stipulates that "subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company." As can be gathered from here, the default model rule is that the directors have all the powers of management.[19] In other words, when a company adopts this model article, the practical position is that all the powers of the company are vested in the directors.[20] In such a

[17]See for instance, Nigerian CAMA 1990, s 66(3).

[18]See Companies Model Articles Regulations 2008 (SI 2008/3229), art 3 of both Sch 1 and Sch 3. It is noteworthy that UK Companies Act 2006, s 19 vests on the Secretary of State for Business, Innovation and Skills the power to prescribe model articles. This, he has done in the Companies Model Articles Regulations 2008 (SI 2008/3229). The Regulations set out model articles of association for private companies limited by shares (Schedule 1) (hereinafter referred to as 'PCLs'); private companies limited by guarantee (Schedule 2); and public companies (Schedule 3) (hereinafter referred to as 'PLCs'). These articles now replace those set out in the Companies (Table A to F) Regulations 1985. But, these and their predecessors under earlier companies legislations continue to apply to companies incorporated prior to 1 October 2009. By virtue of 2006 Act, s 19(3), such companies can elect to adopt all or some of the new model articles. Table A has been amended in so far as it conflicts with the 2006 Act.

[19] But, the articles and/or the Act can withhold certain powers/matters back from the board either wholly or partially. See Davies, P (2010) *Introduction to Company Law*, New York: OUP, (2nd ed.), at p 109.

[20]See Hannigan, B (2009) *Company Law*, New York, OUP, (2nd ed.), at p 182.

case, shareholders generally have practically no power to initiate corporate actions and decisions. They are entitled to approve or disapprove only a few actions of the board. Unlike the original (or orthodox) position,[21] it is now well established that directors are not mere agents of the members in general meeting to carry out its (members in general meeting's) wishes, but are entitled to act in accordance with the powers vested on them.[22] That is, the general meeting cannot and should not interfere with or overrule the decisions of the board of directors in so far as the latter acts within its powers.[23] The right to vote given to the shareholders in the company law and articles thus confers neither decision-making power nor even oversight functions on the general meeting in any meaningful sense.[24]

Measures Put in Place by CAMA and UK Companies Act 2006 to Remove Conflicts and Ensure Smooth Working of the Two Organs of the Company:

In a relationship like this one above, the possibilities of conflicts which may mar the smooth running of the company is always high. Consequently, the common law and the Acts, or the

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[21] *Isle of Wright v Tahourdin*[1883] 25 Ch.D 320.

[22] The correct position is that both the members in general meeting and the board have a share in the management of the company. Thus, in the words of Davies, ".....both the general meeting and the board may bind the company: the former when acting under the reserved powers, the latter when acting under an express or general delegation." Davies, P and Gower, L (2003) *Gower's Principles of Modern Company Law*, (6th ed.), London: Sweet & Maxwell, at p 132.

[23] *Automatic Self-Cleansing Filter Syndicate* (above, n 16); *Shaw and Sons (Salford) Ltd v Shaw*[1935] 2 KB 113. See also s 63(4) CAMA.

[24] See Bainbridge, S.M (2008) *The New Corporate Governance in Theory and Practice,* New York: OUP, at p 4; Dignam, A and Lowry, J (2010) *Company Law*, New York: OUP, (6th ed.), at pp 274-276.

company's articles put in place some in-built mechanisms to check and minimise conflicts between members in general meeting and the board. To ensure this, CAMA, for instance, in section 63(3) provides that:

> Except as otherwise provided in the articles, business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by this Act or the articles required to be exercised by the members in general meetings.[25]

It follows from the above sub-section that if there is no contrary provision in the articles of the company, then the powers of managing the affairs of the company is vested in the board who may exercise all such powers (either by itself or delegate same) except those assigned to the members in general meeting either by the Act itself or by the company's articles. It is noteworthy that it is the company, by its articles, that determines the measure of powers that any of its two organs can exercise on its behalf subject to the express provisions of the Act. This position is strengthened by CAMA, section 63(2) which provides that: "Subject to the provisions of the Act, the respective powers of the members in general meeting and the board of directors shall be determined by the company's articles." The combined effect of section 63(2) and (3) is to ensure that the board does not exercise such powers that have been allocated to the members in general meeting and vice versa.

[25] South African Companies Act 2008, s 66 has a similar provision. See also the UK Companies Model Articles Regulations 2008 (SI 2008/3229), art 3 of both PCLs and PLCs (quoted above).

In order to guarantee the independence of the board of directors and ensure that it carries out its managerial functions without unwarranted interference from the members in general meeting, CAMA, section 63(4) provides that: "Unless the articles shall otherwise provide, the board of directors when acting within the powers conferred upon them by this Act or articles, shall not be bound to obey the directions or instructions of the members in general meeting." The only proviso there is that the directors must be acting in good faith and with due diligence. The above subsection of CAMA seems to be a codification of the judicial decisions in *Automatic Self-Cleansing Filter Syndicate,* [26] and *Shaw & Sons (Salford) Ltd.*[27]

Under the common law, there are exceptional circumstances under which the general meeting may, in the interest of the effective operation of the company, exercise the power which the board should exercise but failed or refused to do so or it became incapable of exercising such power,[28] or where, for all practical purposes, the board has ceased to exist. [29] This common law principle is now enacted in CAMA, section 63(5)(a) and (b). These powers cannot be exercised by the general meeting in the primary sense, but only in the secondary, that is, only when the board is disqualified, unable, refuses or neglects to exercise them. It can therefore not cause any tussle between the board and the general meeting or resuscitate the old controversy as to which of the two organs is superior.

[26](Above, n 16).

[27](Above, n 23).

[28] For instance, in the event of deadlock among the board members: *Barron v Porter*[1914] CH 895.

[29] In such cases, once the situation is resolved and a functioning board is in operation, the power of management reverts back to it.

On the other hand, the powers conferred on the shareholders by CAMA, section 63(5)(c)[30] and (d) are to be exercised by the shareholders at a primary level, not being predicated on whether or not the board first had an opportunity to exercise them. Again, the power of the general meeting under section 63(5)(d) to "make recommendations to the board of directors regarding action to be taken by the board" is intended to encourage the shareholders to make inputs into the management of the company, and not to empower the shareholders to control the board. Of course, as already noted, by virtue of CAMA, section 63(4), unless the company's articles say otherwise, the board is not duty-bound to accept such recommendations;[31] as such, the recommendations play only 'persuasive' impact on the board.

In an American case of *Blasius Industries Inc v Atlas Corporation,*[32] Allen (a former Delaware Chancellor) said that company law "confers power upon directors as agents of the shareholders: it does not create Platonic masters." However, the board of directors is, in fact, not a mere agent of the shareholders:

[30]Power to "ratify or confirm any action taken by the board of directors."

[31] The situation in the UK seems slightly different in that by virtue of art 4 of both 'PCLs' and 'PLCs', the general meeting can, by passing special resolution, give specific direction to the board in relation to a particular matter. The said article, *inter alia*, provides that "the shareholders may, by special resolution, direct the directors to take, or refrain from taking, specified action." Under the common law, by virtue of the decisions of Greer LJ in *John Shaw and Sons (Salford) Ltd* (above, n 23) and Collins MR in *Automatic Self-Cleansing Filter Syndicate* (above, n 16), the general meeting can, as well, cause the board to take a different course of action by either passing a special resolution in that regard or altering the company's articles.

[32]564 A2d 651, 663 (Del.Ch. 1988).

it is an organ of the company just as the general meeting is.[33] It is virtually an independent body enjoying nearly absolute, original and undelegated powers.

In most jurisdictions, the major players in the statutory corporate decision-making structure are the company's directors. The company legislation normally provides for a system of almost absolute delegation of corporate powers to the board.[34] The board is, in turn, authorised to delegate any or all of those powers to subordinate company agents. The vast majority of corporate decision is therefore made either by the board itself or by agents/managers acting on powers delegated to them by the board. The corporate decision-making model can therefore be best described as one in which the board acts and shareholders, at most, react.[35]

Although Nigeria operates a shareholder primacy regime, there may still be some shareholders that are interested or proactive in the board's adoption of more responsible, ethical and stakeholders' inclusive approach in the running of the company who may thus want to make some imputes to the board as regards possible steps it can take to achieve the desired inclusivity and responsive approach, including the company's corporate social responsibility (CSR) to non-shareholding stakeholders. The question is - of what import the said CAMA 1990, section 63(5)(d) is to such members' activism or involvement in the promotion of inclusive corporate stakeholding approach? Do

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[33] See for instance, CAMA 1990, s 63(1).

[34] See for instance, CAMA 1990, s 66(3) above; South Africa Companies Act 2008, s 66; UK Companies Model Articles Regulations 2008 (SI 2008/3229), article 3 of both PCLs and PLCs.

[35] See Bainbridge (above, n 24), at pp 34-35.

their recommendations on corporate inclusivity carry much weight as to cause the board to pay attention to stakeholders' interests? By virtue of section 63(4) CAMA, the board, when acting within its powers, is not bound to obey any recommendations, directions or instructions of the members in general meeting. This is so, unless there is contrary provision in the particular company's articles.
As directors are neither the agents of the shareholders nor are they obliged to follow their instructions, shareholders' ability to influence the company therefore centres on certain fundamental issues, such as the nomination and election of members of the board, the amendment of the company's memorandum and articles of association, approval of extra-ordinary transactions, and other basics as specified in the company law and internal company statutes.[36]

Functions of the Board of Directors:
As noted above, a company is an artificial person. This warrants that natural person(s) must, as a matter of necessity, be acting on its behalf. Thus, Sir H.M Cairns LJ stated in *Ferguson v Wilson*[37]that: "The company itself cannot act in its own person, for it can only act through directors….."[38]

In the words of CAMA 1990, section 650, the term 'director' includes "any person occupying the position of director, by whatever name called."[39] This definition is broad enough to

[36]For instance, CAMA 1990, s 262 gives shareholders a right to remove a director from the board upon complying with the requirements of the section. See also the UK CA, s 168.
[37][1866-67] 2 Ch. App. 77.
[38]Ibid, at p 89.
[39] This is identical with the definition given by the UK CA 2006, in s 250.

accommodate both those validly and legally elected/appointed into the position of directorship[40] and those discharging the role of directors though not duly or actually appointed as directors.[41]Thus, in *Re Lo-Line Electric Motors Ltd,[42]*it was noted that the above definition of 'director' is inclusive and not exhaustive and includes *de facto* directors.[43] No doubt, it includes 'shadow directors'.[44] Specifically speaking, whatever term the articles adopted to describe the members of the company's board (for example, governors, managers, administrators, trustees) is a matter of nomenclature and therefore does not matter: as far as the law is concerned, they are directors.[45]

According to section 244(1) CAMA, directors of a company are persons duly[46] appointed by the company to manage and direct the business of the company.[47] Similarly, in *Olufosoye v Fakorede*,[48] a director was described as a person "appointed or elected according to law, authorised to manage and direct the

[40]That is, '*de jure*'directors.
[41]Otherwise referred to as '*de facto*'directors. See generally, Mervyn Davis J. in *Re Eurostem Maritime Ltd* [1987] P.C.C 190, at p 197.
[42][1988] Ch 477.
[43]Ibid, at p 489.
[44]A 'shadow' director is a person on whose instructions or directions the board is accustomed to act. This, however, excludes any person who gives advice to the board in a professional capacity. See CAMA, s 245.
[45]See *Re Lo-Line Electric Motors Ltd* (above, n 42),at p 488, *per* Browne-Wilkinson V-C, where he said: "In my judgment, `by whatever name called` show that the definition is dealing with nomenclature….."
[46] S 244(2) covers the acts of a *de facto* director. By virtue of that subsection, such acts may be excused.
[47] S 245(1) CAMA includes 'shadow director' in the definition of directors.
[48] [1993]1 NWLR (pt 272) 947.

affairs of the company."[49] From the above and also section 63(3) CAMA, it becomes clear that the function of the board is basically that of management.[50] This will, among other things, include the co-ordination of all the resources of the company (be it material or human) through planning, organising, leading and controlling in other to achieve the objectives of the company.

Corporate legislation in most jurisdictions does not spell out (in details) the functions of the board. This is usually left for the company's articles to do. Consequently, there is no consistency, as far as the roles of the board are concerned. Thus, UK Bullock Committee found that:

> The role of a board varies from company to company and is constantly changing with the requirements of business. It may be related to the size, complexity and nature of the company's operation and therefore to the organisational structure which has been developed over many years. It may depend on the philosophy of management in the company or on the personality of the chief executive.[51]

However, the functions of the company directors can be outlined to include:

(a) Defining the business(es) in which the company shall engage;

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[49] See also *Longe v First Bank of Nigeria PLC*[2006] 3 NWLR (pt 967) 228, at p 270.

[50]This accords with the earlier assertion of Sir Jessel M.R in *Re Forest of Dean Coal Mining Co*[1878] 10 Ch. D 450.

[51]*Report of the Committee of Inquiry on Industrial Democracy*, Cmnd 6706 (1977).

(b) Setting the company's long term objectives and set plans and ensuring that there is adequate machinery for planning;
(c) Organising the company to meet its objectives and delegating authority and certain functions within the company;
(d) Controlling the company's financial affairs including the approval of capital projects and programmes and capital expenditures;
(e) Setting guidelines for employment and personnel policies;
(f) Appointing senior managers, reviewing their remunerations as well as overseeing the process of management development and training;
(g) Monitoring and evaluating performance of the company and those of the senior managers (and maybe the performance of the company's operating divisions and subsidiaries);[52]
(h) Considering policy on corporate re-organisation and reconstruction especially takeovers and mergers.

The above listed functions of the board are not exhaustive as there are other functions other than the above listed managerial functions which the board performs, like allotment of shares, appointment and removal of the company secretary *etc*. But, we are not going to concern ourselves with them. Our principal areas of interests are those functions which the board performs which affect or are most likely going to affect the non-shareholding stakeholders. There have been some debates as to the actual position of the board or rather the actual relationship existing between the board and its company. This will be briefly

[52] Of course, as separate legal entities, the subsidiaries are required to have their own boards.

considered below as it may help us to know how the board can affect corporate wider responsibilities.[53]

Legal Position of Directors:

(a) Directors as Trustees of Shareholders:

Originally, directors were viewed as trustees of the company (and, by implication, trustees of the general body of shareholders as company is synonymous or equated with its shareholders). Thus, in *Re Exchange Banking Co (Flitcroft's Case),*[54] Bacon V-C averred that "I should say they are trustees and nothing else." This is however, in sharp contrast with the opinion of Vaughan J. who said in *Re Kingston Cotton Mill (No 2)*[55] that "a director is in no sense a trustee."[56] There was also a statutory usage of trust terminology in the UK Companies Act 1862**,** section 165[57] under which directors were liable for a "breach of trust." The general notion then was that they hold the assets of the company on trust for the shareholders of the company. As such, they were held liable in the event of any mismanagement just like every other trustee.

53By this we mean the responsibilities of the directors/companies not just to the shareholders as is normally the case in a shareholder primacy regime but also to other stakeholder constituencies, i.e., non-shareholding stakeholders like employees, creditors, customers, suppliers, local community, the environment etc.

54[882] 21 Ch. D 519, at p 525.[

55[1896] 1 Ch 331.

56Ibid, at p 345.

57 "Where, in the course of the winding up of any company under this Act, it appears that any past or present director…....has misapplied or retained in his hands or become liable or accountable for any monies of the company, or is guilty of any misfeasance or *breach of trust* in relation to the company, the court may…....examine into the conduct of such director…..and compel him to repay any monies so misapplied or retained, or for which he has become liable or accountable…...." Emphasis added.

Viewing directors as trustees continued even after the emergent of registered company discarded the need for a deed of settlement.[58] Before 1920s, there was still some confusion as to whether directors are trustees. This was clarified by Romer J in *Re City Equitable Fire Insurance Co*[59] where he stressed that though directors stand in a fiduciary relationship with the company, they are not, strictly speaking, trustees of the company.

> "It has sometimes been said that directors are trustees. If this means no more than that directors, in the performance of their duties, stand in a fiduciary relationship to their company, the statement is true enough. But, if the statement is meant to be an indication, by way of analogy, of what those duties are, it appears to me to be wholly misleading."[60]

Directors' fiduciary relationship to/with the company arises from their appointment and empowerment by the general meeting. That is, they are more or less, agents of the company itself. Thus, Davies wrote:

> To describe directors as trustees seems today to be neither strictly correct nor invariably helpful. In truth, directors are agents of the company rather than trustees of its property. But, as agents, they stand in a fiduciary relationship to their principal, the company.[61]

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[58] See for instance, *A-G v Belfast Corporation*[1855] 4 IR Ch 119; *Grimes v Harrison*[1859] 53 ER 966.

[59][1925] Ch 407, at p 426, CA; [1924] All ER Rep 485.

[60]Romer, J's statement was quoted with the approval of the Nigerian Supreme Court in *Shonowo v Adebayo*[1969] 1 All NLR 176, at p 186.

[61]Gower (above, n 22), at p 380.

The same view is shared by Sealy who strongly emphasised that though directors are held liable as trustees, they are, in fact, not trustees. He saw the survival of the "old label" as a "real mystery".[62] Similarly, in *Regal (Hastings) Ltd v Gulliver,*[63]Lord Porter said: "directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form."[64]

The law of trust does not allow a trustee much wide discretion in what he does. "Often fixed rules, either of law or of court practice, fetter his activities and prescribe, within close limits, the proper course for him to take."[65] It has therefore been argued that imposing on directors the very strict standards required of trustees could inhibit and stifle their entrepreneurship and their effective management of the company's affairs and would therefore be disadvantageous.[66] Davies remarks that "caution would be a desirable result if the directors were truly trustees, for whom the preservation of the capital of the trust was the overriding consideration, but it (i.e., caution) would be a highly undesirable result for directors of companies in the private sector of the economy whose task is to generate wealth by taking risks, albeit only where the risk/reward ratio is acceptable."[67] Consequently, directors are allowed wider discretions than trustees.

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[62]Sealy, L.S (1967) "The Director as Trustee" 25(1) Cambridge L.J 83, at p 85.
[63][1942] 1 All ER 378, HL; (1967) 2 AC 134.
[64]Ibid, at p 379.
[65]Sealy (above, n 62), at p 89.
[66]*Re Faure Electric Accumulater Co.*[1888] 40 Ch.D 141.
[67] Davies (above, n 19), at pp 151-152.

That is, trustees must take great care to avoid exposing the trust property to undue risks. Unlike a director whose conduct of his enterprise is a matter for his (business) judgment as a businessman and is virtually free to undertake some speculative and risky business ventures, a trustee looks unto the law for direction as to the kind of investment to make with the trust property.

It should be recalled, however, that most if not all fiduciary principles are trust principles, and it is on these trust principles that directors' liability is traditionally determined. [68] Consequently, the court normally holds the directors accountable on the same basis as trustees:

> Though directors are not, properly speaking, trustees, they have always been considered and treated as trustees of money which comes to their hand or which is actually under their control…..Directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees.[69]

Thus, it has been said of directors that "in some respects they resemble trustees, in others they do not."[70]

While there are a host of judgments in the corporate jurisprudence in which the 'trust' label is used, in most instances, it is clear that the judge meant to convey the idea that directors are subject to the general rule against opportunism - a rule some people have

[68]Sealy (above, n 62), at p 86.
[69]Per Lindley LJ in *Re Lands Allotment Co*. [1984] 1 Ch 616, at p 631, CA.
[70]*Re Regal (Hastings) Ltd v Gulliver* (above, n 63), at p 147, *per* Lord Russell.

assumed originated in the trust context. Consequently, the notional assignment of trustee status to directors appears not to have produced any serious confusion in the jurisprudence, as almost all judges recognise the analytical limitation of the analogy techniques.[71]

In the words of Dodd, "it is not for a trustee to be public-spirited with his beneficiary's property."[72] If directors were to be trustees (in the strict sense of the word)[73] of their company and its assets, this would have raised a serious question as to - in whose interests will those corporate assets (held in trust by the directors) be managed? That is, as those assets are being held in trust for the shareholders,[74] is it not contrary to the law (of trust) to expect those assets to be managed and (the proceeds) utilised for any other person's benefit other than those of the beneficiaries (*i.e.* shareholders)? Legally, it is only the beneficiaries to a trust property that are entitled to it and no one else. The vital question would have been - how proper is it to expect the assets of the company which the board is holding in trust for the shareholders to be used for public good and for the non-shareholding stakeholders' welfare as some people such as the communitarians are advocating?

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[71] Flannigan, R (2006) "The Adulteration of Fiduciary Doctrine in Corporate Law" 1 L.Q.R 449, at pp 450-451.

[72] Dodd, E.M (1932) "For Whom are Corporate Managers Trustees?" 45 Harvard L.R 1145, at p 1160. This article was written in response to the argument presented in Berle's article "Corporate Powers as Powers in Trust" (1931) 44 Harvard L.R 1049, in which he portrayed the managements' powers as powers they hold in trust for the shareholders.

[73] Orojo (above, n 5), at p 265, wrote that "directors are not so strictly accountable as other trustees, and are, at most, only *quasi* trustees."

[74] As already noted, the company is most often equated or synonymous with its shareholders.

It is only the beneficiary of a trust who can validly say how the proceeds of the trust property can be utilised. So, in this our case, if the board were holding the properties of the company on trust for the shareholders, it is logical and in line/accord with the established law of trust that the trust property can either by utilised for their own exclusive interests, or be used in accordance with their directions or instructions.

It would have thus been wrong for the directors to utilise the assets/profits of the company in any other way other than to maximise shareholders' profit, or for any other 'charitable' purpose as directed by the shareholders. That being the case, any unauthorised use of the corporate assets and profits accruing therefrom to further the interests of non-shareholding stakeholders in deviation from the profit maximisation objective of the company would have been illegal, illegitimate and condemnable.[75] The question would have then be - what is the basis for people clamouring for inclusive corporate stakeholding? On the other hand, if it can be established that directors are neither trustees of the shareholders nor hold the property of the company in trust for them,[76] then, what right do the shareholders have that gives them exclusive ownership/entitlement to the assets/profits of the company?[77] This gives rise to another question: if the

[75]See Friedman, A.L and Miles, S (2006) *Stakeholders: Theory and Practice,* London: OUP, at p 33.
[76] See for instance, Sealy (above, n 62); *Regal (Hastings) Ltd* (above, n 63), at p 379; *Re City Equitable Fire Insurance Co* [1925] Ch 407, at p 426, CA, perRomer J.
[77]Berle, A.A and Means, G.C ((1932) *The Modern Corporation and Private Property*, New Brunswick and London: Transaction Publishers) were of the view that shareholders' investment in the company entitles them to the profits made by their investment. But, it should be recalled that some other

property/assets of the company are not being held in trust for the shareholders by the directors, is it proper to equate the interests of the company with those of the members only (that is, excluding other non-shareholding stakeholders?). There are some theories for and against these claims which are worth reviewing but which will be for another day.

(b) Directors as Fiduciaries of the Company:

We need to consider why it is important to impose fiduciary obligations on the company directors. It is settled that directors stand in a fiduciary relationship with their companies.[78]

> The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of afiduciary nature towards their principal.[79]

According to Millett, a fiduciary is a "person who undertakes to act for or on behalf of someone else in circumstances which give

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stakeholders, e.g. employees do invest heavily on the company, albeit human resource/labour investment as against cash investment made by the shareholders. Some other writers believe that shareholders are entitled to the profits of the company because they are the residual risk bearers.

78See CAMA 1990, s 279(1); Dignam, A and Lowry, J (2010) (above, n 24), at pp 11, 284 and 312. This duty requires them to observe utmost good faith in whatever they are doing for, on behalf of or with the company. S 179(1), *ibid.*

79*Per* Lord Cranworth LC in *Aberdeen Railway Co v Blaikie Bros* (1854) 2 Eq Rep 1281, HL.

rise to trust and confidence between the parties."[80] Any fiduciary relationship is a trusting relationship.[81] The importance of protecting a trusting relationship has been variously recognised both by courts and writers in a number of instances. "No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relationship of confidence to each other......"[82] It has been referred to as a "principle of humanity"[83] which principally exists for the "preservation of mankind"[84] and should be guarded with a "jealousy almost invincible."[85] Its inflexibility is beyond doubt and it is necessary that it should be so and "must be applied inexorably."[86]

The essential defining characteristic of fiduciary relationship is a confidential and trusting relationship.[87] The general rule is that "he who undertakes to act for another in any matter, shall not, in the same matter, act for himself."[88]Thus, Weinrib[89] maintains that "the hallmark of a fiduciary relation is that the relative legal

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[80]*Per* Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 CA, at p 18.
[81]Weinrib, Ernest J. (1975) "The Fiduciary Obligation" 25(1) U.T.L.J 1.
[82]*Per* Vice Chancellor Turner, in *Billage v Southee* (1852) 9 Hare 534, at p 540 (68 ER 623).
[83]*Hylton v Hylton* (1754) 2 VesSen 547, at p 549 (28 ER 349).
[84]*Welles v Middleton* (1784) 1 Cox 112, at p 124-5 (29 ER 1086).
[85]*Hatch v Hatch* (1804) 9 Ves Jun 292, at p 297 (32 ER 615).
[86]*Parker v McKenna* (1874) 10 LR Ch 96, at p 124.
[87]*Tate v Williamson* (1866) 2 LR Ch. App 55, at p 61, *per* Lord Chelmsford LC; Flannigan, R (1989) "The Fiduciary Obligation" 9(3) O.J.L.S 285, at p 302.
[88]*Per* Lord Loughborough in *Whichcote v Lawrence* (1798) 3 Ves.Jun. 740, at p 750.
[89]Weinrib (above, n 81), at p 7.

positions are such that one party is at the mercy of the other's discretion."

The function of fiduciary responsibility/regulation is aimed at controlling the opportunism of those who have access to the assets of others.[90] The law insists that such a person must be disabled from serving himself: "he that is entrusted with the interests of others, cannot be allowed to make the business an object of interest to himself; because from the frailty of human nature, one who has power, will be too readily seized with the inclination to use the opportunity for serving his own interests at the expense of those for whom he is entrusted."[91] As a result, fiduciary relationship is imposed on the trusted person since ".......he who bargains in matters of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys and everyone else."[92] This obligation on the trusted person is a very significant one; targeted at protecting the integrity and credibility of trusting relationships.[93]

As already noted, a company is (a) non-human, but a legal creation. It therefore works through human intermediaries - chiefly the directors and managers. The use of these intermediaries usually gives rise to some problems commonly associated with agency. Directors are generally viewed as agents

[90]Flannigan, R (2004) "The Boundaries of Fiduciary Accountability" 83 Canadian Bar Rev 35.
[91]*York Building Co v Mackenzie* (1975) 8 Bro. 42, at p 63.
[92]*Per* Lord Eldon in *Gibson v Jeyes* (1801) 6 Ves 266, at p 278.
[93]Finn, P.D (1989) "The Fiduciary Principles" in T.G Youdari (ed.) *Equity, Fiduciaries and Trusts*, Toronto: Carswell, Chapter One.

of the company;[94] and every agent owes a fiduciary duty to his principal.[95] Because of the nature and duties attached to the office of directors, fiduciary duties are imposed on them, i.e., on their office. Thus, they (directors) are subject to the same degree of fiduciary duties invented by equity to ensure due compliance with the basic principle that fiduciaries must not benefit themselves from their position of trust.[96]They must not use their position for self-serving.

A fiduciary is normally left with wide discretions. The discretions so placed on him are vulnerable to abuse. Thus, Flannigan said that:

> Agents are trusted by principals.....and it leads to the agents being entrusted with assets. Because of this trust, agents are in a position to harm the interests of their principals. Mischievous conduct can take various forms. It may be opportunistic or self-serving.....The conduct of the agent may be expedient, complacent or disinterested in the sense of not caring. They may do what is convenient rather than what is optimal. Or the agent may act unreasonably or capriciously.......[97]

The mischief is obvious. Davies[98] described it extensively thus:

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[94]However, directors normally have much wider powers and discretions than agents: Ferran, E (1999) *Corporate Law and Corporate Finance*, London: OUP, at p 157.
[95] See Lord Cranworth LC in *Aberdeen Railway Co*(above, n 79).
[96]Dignam and Lowry (above, n 24), at pp 265, 390-392.
[97]Flannigan (above, n 87).
[98]Davis K.B (1985) "Judicial Review of Fiduciary Decision-Making: Some Theoretical Perspectives" 80 NWULR 1, at p 15.

> ....the fiduciary may cheat the principal, either by appropriating his assets or by self-dealing on terms unfair to him. The fiduciary's costs of doing business are borne by the principal. As is the case with corporate managers, the fiduciary may set excessive compensation or fringe benefits or provide perquisites beyond the minimum necessary to conduct the principal's business in the most effective manner.

Continuing, he said:

> More subtle mechanisms for self-enrichment are available as well. The fiduciary's interest in protecting his/her employment may lead hi/her to turn down opportunities that would further the principal's objectives........ Or the fiduciary may seek to expand his/her compensation by initiating or acquiring new business opportunities not strictly consistent with maximising the principal's welfare. Finally, there is the fiduciary's ever-present incentive to 'shirk' – that is, to divert attention from productive activities that benefit the principal to activities that offer more leisure or personal gratification to the fiduciary.[99]

As can be seen from the above, it is not only managerial profiteering that is objectionable. Managerial shirking and other conducts such as disinterested and uncaring attitudes are also rejected - as a fiduciary should act with "reasonable attention."[100]

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[99]*Ibid*.

[100]*Phipps v Boardman* [1967] 2 AC 46, at p 124; [1966] 3 All ER 721 HL; *Gibson v Jeyes*(above, n 92), at p 272-3.

He should act in such a way as to make it difficult if not impossible for anyone to establish that he supposed to have acted more prudently and attentively.[101] Consequently, the law and the court, as a matter of necessity, saw the need to respond and, at least, curtail the mischief that may arise out of the corporate intermediaries. Fiduciary duties, common law duty of care and skill and other statutory duties are therefore attached on the office of directors aimed at putting them in check.[102]

Because of the detection and evidentiary difficulties,[103] a strict rule was instituted. But, it is good to point out that though there is a great need to regulate and control the corporate activities and decision-makings of the directors, there is, importantly, the need to take care in doing so as not to stifle unduly their managerial discretions and business ingenuities. It seems beyond doubt that a too strict imposition and enforcement of fiduciary obligations and other duties on the directors may impinge on their managerial discretionary powers and, in turn, their efficiency, arguably, to the disadvantage of all the stakeholders. Thus, though UK Jenkins Committee[104] strongly believes that it is expedient to protect the shareholders and other non-shareholding stakeholders; and that those responsible for the management of the company should be subjected to statutory regulations and control, it however warned that:

[101]*Gibson* (*ibid*) at p 276.
[102] Some examples of the cases are: *Aberdeen Railway Co* (above, n 79);*Regal (Hastings) Ltd* (above, n 62); *Island Export Finance Ltd v Umunna* [1986] BCLC 460.
[103]*Ex parte Lacey*(1802) 6 Ves 625, at 627-629; *Regal (Hastings) Ltd* (*ibid*), at p 392-393.
[104]Board of Trade, *Report of the Committee on Company Law Amendment* (1962) Cmnd 1749, ('Jenkins Committee').

> Controls and regulations carried to excess may defeat their own object; and we share the views of the Greene and Cohen Committees as to the undesirability of imposing restrictions which would seriously hamper the activities of honest men in order to defeat occasional wrongdoer, and the importance of not placing unreasonable fetters upon business which is conducted in an efficient and honest manner.[105]

It is noteworthy that it is not every duty owed by a fiduciary that is a fiduciary duty. As noted above, a fiduciary duty is imposed only on those duties that stem from a position of trust and confidence. Thus, although a director's duty of care and skill is an equitable duty, it is not a fiduciary one - as it has nothing to do with trust reposed on the director by the company.[106]
If corporate directors, as fiduciaries, manage the assets and businesses of the corporation prudently, eschewing opportunisms and self-serving and other agency-related problems, there is most likely going to be enough corporate proceeds to go round the corporate stakeholders to the happiness and fulfilment of all. This will also entail making corporate policies (and implementing corporate programmes) that will be considerate of and favourable to the environment.

Conclusion

Though shareholders can help in corporate integrativeness of wider stakeholders' interests, the board is the organ of the

[105]Ibid, at p 3, para 11.
[106]Millett LJ in *Bristol and West Building Society* (above, n 80);Ipp J in *Permanent Building Society v Wheeler*[1994] 14 A.C.S.K 109, at pp 152 and 159.

company that is better placed to champion and include or integrate the interests of non-shareholding stakeholders in the policies and management of the big corporations. The corporate legislation and practice, as well as the articles of most companies placed the board in that position. The writer, therefore expect the board to, as much as practicable, endeavour to consider the company's (wider) responsibilities not just to the shareholders but to other stakeholders as well since it is not only the shareholders who contribute to the success of the company, other non-shareholding stakeholders do so also. Again, the negative impacts of the activities of the corporation affect and are borne not solely by the shareholders but by other stakeholders as well. There should, thus, be a fair sharing of the corporate pie between the shareholders and other stakeholders as non-shareholding constituencies contribute to the making of and the ultimate size of the pie.