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The Concept of Interlocking Directorship under Nigerian Corporate Jurisprudence: The Antithesis of the No Conflict Rule and Fair Competition

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Abstract

The separation of ownership from control in the widely-held large public companies which tap the Stock Exchange funds is one of the major developments of corporate capitalism. This separation is inherent in the formal structures of company law because the law gives distinctive roles to shareholders who are the theoretical owners of companies and to those who are the managers. There is, therefore, delegated management under a board structure and while ownership of the company vests in the financial proprietors, management is in the hands of directors. This prompts major agency problems as there are conflicts between managers and shareholders. There is potential for abuse of power by directors and to forestall this, the law has imposed the duty of care and the fiduciary duty of loyalty and good faith on directors. However, despite this legal mechanisms put in place to check directors, Nigerian law has endorsed interlocking or multiple directorship of rival companies, with damning consequences, in the absence of an elaborate anti-trust regime to regulate anti-competitive activities between companies. Using the doctrinal method, this article has analysed the concept of interlocking directorships, diagnosed the ills associated with it and brought out its effects on the directors' duty to avoid conflict of interest and on fair competition. The article then prescribes the jettisoning of the concept from Nigeria's companies' statute or elaborate regulation of same, if it is to be retained, to cushion its effects.

Keywords – Interlocking Directorship, Antithesis, Conflict of interest, Fair competition.

1.1 Introduction

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Delegated management under a board structure is one of the hallmark features of the corporate form and the separation of ownership from control in the large public companies with numerous and dispersed shareholding bodies and which tap the stock exchange funds is one of the major developments of corporate capitalism. This separation is inherent in the formal structures of company law because the law gives distinctive roles to the shareholders who are the theoretical owners of companies and to those who are managers.[1] The tendency today is that ownership of the company vests in the financial proprietors whereas management is in the hands of directors.

Although this disconnection of ownership and control reduces the cost of decision-making by avoiding the need to consult with the shareholders and obtain their assent before fundamental decisions regarding the company are taken, and also allows the board to serve as a mechanism for protecting the interests of minority shareholders and other corporate stakeholders without undue fetters from the corporate owners,[2] the exercise of powers by directors is prone to abuse leading to serious conflicts and disenchantment. To forestall this ugly trend, the law has imposed duties – the duty of care and the fiduciary duty of loyalty and good faith on directors of companies.

The duty of care is the duty of the board of directors to act in the same manner as an ordinary prudent person would act under similar circumstances.[3] The

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[1]Companies and Allied Matters Act, 2004; Section 63(3) & (5)

[2] RC Clark, *Corporate Law* <http://www.law.upenn.edu/journals/jil/articles/volume2/issue2/MertensSchanze2J.Comp.Corp.LandSec.Reg.75 (1979) pdf.> accessed 20 January, 2018.

[3] CAMA 2004, Section 282; Nicholas J, 'Board Recruitment, Board Refreshment, Board Succession Planning' <https://insights.dilige.com - What Are Interlocking Directors?> accessed 28 June, 2019.

fiduciary duty of loyalty and good faith requires directors to exercise their powers bona fide and for the benefit of the company as a whole, and avoid placing themselves in a position which their personal interests and their duty and fiduciary position would conflict.[4] However, despite the duty of care as a staple of corporate governance and the prophylactic anxiety which underlie the no conflict rule, indulgence is displayed by Nigerian company law towards a director who holds multiple (inter locking) directorships simultaneously in rival companies. This is curious and unfortunate because of the absence of elaborate anti-trust laws in the country to prevent anti-competitive co-ordination between companies that would upset the stability of the financial marketplace.

This article seeks to analyse the concept of interlocking/multiple directorship, diagnose the ills associated with it and bring out its effects on the directors' fiduciary duty of loyalty and good faith which entails avoidance of conflict of interest, and on fair competition. Appropriate prescriptions are eventually made to cushion the effects.

1.2 Conceptual Clarifications

In a discourse of this magnitude, it is desirable to clarify basic and relevant concepts to make reading simpler and comprehensible. Against this backdrop, the following concepts are explained:

[4] CAMA 2004, Sections 279(1), (3) & (4); 280

1.2.1 Interlocking Directorship

Black's Law Dictionary[5] defines interlocking director as: "A director who simultaneously serves on the boards of two or more corporations that deal with each other or have allied interests." An interlocking directorate (or directorship) is created when an individual who sits on the board of directors of one business organization takes a board seat with another.[6]

West's Encyclopedia of American Copyright,[7] explains that interlocking directorate is the relationship that exists between the boards of directors of one corporation with that of another due to the fact that a number of members sit on both boards and therefore, there is a substantial likelihood that neither corporation acts independently. Due to the fact that the same persons sit on the boards of companies that are supposed to compete in the marketplace, there is a potential for infractions of Federal Anti-trust Acts particularly the Clayton Act,[8] which prohibits the existence of interlocking directorates that substantially reduce commercial competition.

Business Dictionary[9] defines the concept as membership of the board of directors of two or more firms by the same individual. The concept, interlocking directorship, in its strictest sense, refers to a situation in which a member of the board of directors of one corporation also serves as a member of another corporation.[10] At its broadest, it is the situation in which:

(i) a member of the board of directors of a company,

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[5]Bryan A Garner (ed), *Black's Law Dictionary*, (9thedn, Thomson Reuters 2009), 527; See also <https://definitions, us legal.com> accessed 28 June, 2019.

[6] A Dictionary of Sociology, originally published by Oxford University Press, 1998 <https://www.encyclopedia.com> accessed 28 June, 2019.

[7] West Encyclopedia of American Copyright 2005, The Gale Group, Inc., <https://www.encyclopedia.com> accessed 28 June, 2019.

[8]15 USCA §§12-27 (1914)

[9] Business Dictionary, <https://www.businessdictionary.com> accessed 28 June, 2019

[10]The Linux Information Project, 8 April 2006, <www.linfo.org interlocking direct….> accessed 28 June, 2019

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(ii) a top executive of that company, or

(iii) a close relative (for example, wife, or father) of a member of the board of directors or of a top executive of that company serves as a member of the board of directors of another corporation.[11]

Although the Companies and Allied Matters Act has provided for multiple directorship (which is used interchangeably by scholars with interlocking directorship), the concept is not defined anywhere in the Act. However, from the wording of the provision[12] that "the fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company…", it can be implied that it is a practice whereby members of the board of directors of a company serve on the boards of multiple companies. In other words, a member of the board of one company simultaneously sits on the boards of other companies.

1.2.2 Antithesis

The Advanced Learner's Dictionary[13] defines the word antithesis as "the opposite of something; a contrast between two things." It is therefore, the state of two things being directly opposite to each other. In the context of this discourse, it is used to portray that the concept of interlocking/multiple directorship is the direct opposite of the no conflict rule which directors of companies are required to observe under the fiduciary duty of loyalty and good faith foisted on them by law, and fair competition. It is contrary to these basic governance principles.

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[11]Ibid.
[12]CAMA 2014, Section 281
[13]A S Hornby, *Oxford Advanced Learner's Dictionary of Current English* (8thedn, Oxford University Press 2010), 55

1.2.3 No Conflict Rule

This rule, derived from directors' fiduciary duty of loyalty and good faith, means that directors should avoid placing themselves in a position in which their personal interests and their duty and fiduciary position would conflict.[14] The no conflict rule requires directors to avoid conflict of interests in executing their mandate.

1.2.4 Fair Competition

Before attempting an explanation of fair competition, it is but good to clarify the concept, 'competition' itself. Black's Law Dictionary[15] defines competition as "the struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties." It proceeds to define 'fair competition' as "open, equitable and just competition between business competitors."[16] Fair competition is, therefore, a business practice by companies that is transparent, unrestrictive, egalitarian and just in the market place in which they operate.

Competition law (known as anti-trust law) in the United States of America (USA) and trade practices law in the United Kingdom (UK) and Australia is defined by the Oxford Dictionary of Law[17] as "the branch of law concerned with the regulation of anti-competitive practices, restrictive trade practices, and abuse of dominant position or market power. It refers to those laws which promote or maintain market competition by regulating anti-competitive conduct of companies.[18]

[14]CAMA 2004, Sections 279(1), (3) & (4); 280
[15]Bryan A Garner (n5), 322
[16]Ibid.
[17]Elizabeth A Martin and Jonathan Law (eds), *Oxford Dictionary of Law* (6[th]edn, Oxford University Press 2006), 111.
[18]M D Taylor, *International Competition Law: A New Dimension for WTO*? (Cambridge University Press 2006), 1

1.3 Nature of Directors' Fiduciary Duty and to whom it is owed

A director is an entrepreneur or a businessman, his primary duty being to take risk to generate profit for the company. In law, however, the director is seen both as a trustee and as an agent and the duties attachable to his position are traceable to this dual character. It has long been established that in dealing with third parties, directors act as agents, so that as Cairns, LJ said in *Ferguson v Wilson*:[19]

> *They are merely agents of the company. The company itself cannot act in its own person; it can only act through directors, and the case is as regards those directors, merely the ordinary case of principal and agent. Whenever an agent is liable those directors would be liable; where liability would attach to the principal, and the principal only, the liability is the liability of the company.*

It has also been said to some extent and in some sense, directors are trustees. This dual character of directors is perhaps best expressed in Lord Selbourne's words in *Great Eastern Railway v Turner*,[20] where he said: "the directors are mere trustees or agents of the company – trustees of the company's money and property – agents in the transactions which they enter into on behalf of the company."

This dual position of directors at common law is reflected in Section 283 of the Companies and Allied Matters Act, 2004. This relates specifically to the origins of companies themselves. Companies, prior to the Joint Stock Companies Act 1844, were unincorporated and the constitutional document was a deed of settlement vesting the assets of the company in trustees. This practice of describing directors as trustees continued even after the advent of

[19](1866) LR2 Ch77 at 89
[20](1872) LR8 Ch149, 152

the registered company had done away with the need for a deed of settlement.[21]

The confusion as to whether directors are trustees persisted and Romer J in *Re City Equitable Insurance Co*.[22] sought to clarify the issue when he stated:

> *It is sometimes said that directors are trustees. If this means no more than the directors in the performance of their duties stand in a fiduciary relationship with the 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. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement. It is indeed impossible to describe the duty of a director in general terms, whether by way of analogy or otherwise.*

The fact that the law relating to directors has been built around the doctrinal rigidities of agency and trust creates a very serious gap between the legal role of directors and their practical role as businessmen. Perhaps directors may be equated with trustees in the strict legal sense of the concept. However, they are not trustees in the general sense because being managers of a commercial undertaking, they must take risk in business decisions which an ordinary trustee is not permitted to do; he must be cautious and avoid risks. Though directors must act with due care, diligence and skill, this is quite different from the duty to be cautious and avoid risks.

Directors are not therefore trustees, rather, their fiduciary relationship arises from their appointment and empowerment by the general meeting, that is, from their status as a specie of agent. The fiduciary relationship and thus, the fiduciary duty begins once the appointment takes place.[23] Davies[24] submits

[21]Allan Dignan and John Lowry, *Company Law* (Oxford University Press 2006), 265
[22](1925) Ch 307 at 426
[23]Ibid (n21)
[24]Paul L Davies (ed), *Gower and Davies Principles of Modern Company Law* (7thedn, Sweet & Maxwell 2003), 380

that with directors of incorporated companies (as opposed to unincorporated companies prior to the Joint Stock Companies Act, 1844), the description "trustees" was less apposite because the assets were now held by the company, a separate legal person, rather than being vested in trustees. He argues further that 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 it or its property.[25]

But it does not matter whether directors are called trustees or agents because as Jessel, MR puts it in *Re Forest of Dean Coal Mining Co.*,[26] "their true position… is that they are merely commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it."

The more correct description of directors is that they occupy a fiduciary position and all the powers, entrusted to them are only exercisable in this fiduciary capacity. Consequently, they must exercise their powers *bona fide* and for the benefit of the company as a whole, and must not place themselves in a position in which their duties may conflict with their personal interests. They are to avoid using corporate property, information and opportunity to their advantage without the informed consent of the company.[27] As fiduciaries, they should not feather their nests and act bona fide in the best interest of the company as a whole so as to preserve its assets, further its business and promote the business for which it was formed. For this purpose, the interest of the company comprises the interest of the members and employees.[28]

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[25]Ibid.
[26](1897) 10 Ch 450 at 452; See also Honowo v Adebayo (1969) All NLR 176 at 186
[27]See Re George Newman (1985) 1 Ch 674; Cooks vDeeks (1916) 1 AC 554; Regal (Hastings) Ltd v. Gulliver (1942) All ER 278; Industrial Development Consultants Ltd v Cooley (1972) 1 WLR 443; Canada Aero Service vOmalley (1973) 40 Dominion LR 371
[28]See CAMA 2004, Section 279(3) & 4)

The issue of how the interest of the company is determined has been held to be within the discretion of the directors and not the courts. Thus, in *Smith v Fawcett Ltd*,[29] Green, MR stressed that directors are required to act bona fide in what they consider, not what the court considers, is in the interests of the company.

The pertinent question is, this fiduciary duty of loyalty and good faith, which embodies avoidance of conflict of interests by directors, is owed to who? Traditionally, the law has been that the directors are in fiduciary position only towards the company and the company alone, not to the individual shareholders or the public. This principle was established in the much criticized decision in *Percival v Wright*[30] where the directors had purchased shares from their members without revealing to them that negotiations were in progress for a sale of the undertaking of the company to a third party at a more favourable price. In an action brought by the members (vendors) to recover damages from the directors who had failed to disclose vital information, it was held that there was nothing unlawful in what the directors had done and so, the members could not impeach the contract since the directors' fiduciary duty of disclosure was owed to the company itself, not the individual shareholders.

Today, however, Section 279(2) of the Companies and Allied Matters Act, 2004 makes an attempt at codifying the exceptions to the rule in cases where the director was acting as an agent of a particular shareholder or in transactions involving the company's securities such as in the course of a take-over. This is in line with the decisions in *Allen v Hyatt*[31]and *Briess v Woolley*[32] which appear to recognize that in certain circumstances, directors owe duties to individual shareholders. Besides these cases, it is submitted that the modern

[29](1942) Ch 304 at 306 (CA)
[30](1902) 2 Ch 421
[31](1914) 30 LTR 444
[32](1954) AC 33 (HL)

company is a conglomeration of heterogeneous interests including the general public. Disclosure will expose to public view matters which government is unwilling to regulate prescriptively but which it hopes, perhaps, optimistically, will either be promoted or contained (as the case may be) through the pressures of public opinion. There should, therefore, be a paradigm shift from the traditional position of the law as to whom the directors' fiduciary duty is owed to a modern view or position which is broader to cover all the corporate constituencies.

The extant law which regulates companies and powers of directors in Nigeria has recognized the likely effect of interlocking directorship on the fiduciary duty of directors and has cautioned against abuse of the concept. It provides:

> *The fact that a person holds more than one directorship shall not derogate from his fiduciary duties to each company including a duty not to use the property, opportunity or information obtained in the course of the management of one company for the benefit of the other company, or to his own or other person's advantage.*[33]

The above provision requires a director who serves on multiple boards of companies to avoid conflict of interests between the companies as he stands in a fiduciary position towards all the companies. The threshold question regarding the fiduciary duties of loyalty and good faith owed by directors to their company however, is how they will avoid conflict of interest in situations of multiple or competing directorships. In other words, is it feasible to observe the no conflict rule in situations of interlocking or multiple directorships?

[33] CAMA 2004, Section 281

1.4 Nature of Interlocking/Multiple Directorships

The directors of a company occupy a very strategic position because they are exclusively vested with the power of management of the company. Indeed, the law[34] has defined directors as persons duly appointed to direct and manage the business of the company. Since the exercise of such power is prone to abuse, the law has imposed duties – the duty of care and the fiduciary duty of loyalty and good faith on directors in order to constantly keep their powers within check and acceptable limits.

The concept of interlocking/multiple directorship is under most circumstances, legal and perfectly acceptable. It is so under Nigerian corporate jurisprudence as the extant law[35] has implicitly provided for it. Interlocking directorship can occur either directly or indirectly. Direct interlock exists where an individual is a director on the board of two different companies. This is the strongest and most commonly and readily discernible form of interlock. An interlock is indirect if two companies with no common directors are linked through another company or group of companies with whom they share directors.[36]

This link is through cross share-holdings (interlocking share ownerships). Thus, interlock could either be vertical or horizontal based on its direction. If two or more companies that deal with each other as supplier and customer share a director, it is vertical interlock. Horizontal interlock occurs when two or more companies in the same industry and at the same stage of production share directors, perhaps to reduce cost of management or, more mischievously, to promote monopoly. The practice of interlocking directorship

[34]Ibid, Section 244
[35]Ibid (n33)
[36]Paul O. Idonigie, 'Interlocking Directorates and Corporate Governance' [2004] (32) (2) International Business Lawyer, 75; D S Skinner 'Unlocking the Interlocks: Common Law Fiduciary Duties and the Phenomenon of Interlocking Directorate in the Common Wealth Carribbean' [1994] 53 (3) Journal of Transnational Law, 8.

although widespread and lawful, raises questions about the quality and independence of board decisions as well as loyalty to mutual corporate competitors.

1.5 Causes/Reasons for Director-Interlocks

There are several causes or reasons for director interlocks across individual and company dimensions. These include the following:

(i) Collusion:- Interlocks represent intentional attempts by corporate organizations to engage in practices that restrict competition in the market.[37] Interlocking directorship have long been used by corporations to maintain and expand their powers, for example, they can be used to form a cartel, which is a form of collusion between companies in the same industry aimed at restricting output and increasing prices.[38] They can also be used to gain influence or control over major suppliers or customers.[39]

(ii) Co-optation and monitoring:- Another purpose for interlocking directorship is that interlocks are used by companies to co-opt resources to their group for effective monitoring.[40] Thus, interlocks between financial institutions and business corporations perform a monitoring function by which the former control the profitability of their investments.[41] Major banks, in particular, tend to be at the centre of the interlock network and have large numbers of interlocks. There is therefore, substantial cross-shareholdings within the networks.

[37]Mark Mizruchi, 'What Do Interlocks Do?: An Analysis, Critique and Assessment of Research on Interlocking Directorates' Annual Review of Sociology, 1996 <https://www.encyclopedia.com>; Young S (2013), 'Director Interlocks' in Idowu S O and Capaldi N and Zu L and Gupta A D (eds), *Encyclopedia of Corporate Social Responsibility* (Springer, Berlin, Heidelberg) <https://link.springer.com..> all accessed 28 June, 2019
[38]Ibid (n10)
[39]Ibid
[40]Ibid (n37)
[41]Ibid

(iii) Social cohesion:- It has been observed that interlocks allow for cohesion, coordinated action, and unified political economic power of corporate executives. They allow corporations to increase their influence by exerting power as a group, and to work towards common goals. They help corporate executives maintain an advantage, and gain more power over workers and consumers by reducing intra-class competition and increasing cooperation. Interlocks facilitate a community of interests among the elite of the corporate world that supplants the competitive and socially divisive ethos of an earlier stage of capitalism with an ethic of cooperation and a sense of shared values.[42] The individuals that are part of director interlocks tend to come from wealthy backgrounds and socialize with the upper classes and their names are roughly twice as likely as single directors to be in the Social Register, to have attended a prestigious private school, or to belong to an elite social club.[43]

(iv) Legitimacy:- Apart from being legal, interlocks have benefits over trusts, cartels and other monopolistic/oligopolistic forms of organization, due to their greater fluidity, and lower visibility making them less open to public scrutiny. They also benefit the companies involved due to reduced competition, increased information availability for directors and increased prestige.[44] This helps to promote managerial motive and ultimately, managerial revolution to enhance directors' positions.

[42] Ibid
[43] Ibid
[44] Ibid

1.6 Problems with Interlocking Directorships

Three distinct problems are associated with interlocking directorships. They include:

(i) Extra-ordinary and egregious retirement or consultant packages.

(ii) Excessive board remuneration or pay that is not performance-related, that is, board pay even in instances of poor performance and corporate failure thereby rewarding failure.

(iii) The problem of share option back-dating.[45]

A paradigm example of the first two problems above is the case of the former Chief Executive Officer (CEO) of General Electric, Jack Welch, who was CEO from 1981 to 2001. During his tenure, the company greatly prospered and its value rose about 4000%. The media reported that Welch had received one of the most extra-ordinary director remuneration packages, which afforded him life-time access to the company's facilities and services, including access to the company's plane, company cars, company apartments and financial planning services, not to mention a $417 million retirement package – the largest payment in America's history.[46]

Interlocking directorship can be an effective tool in influencing the political system, for example, a monopoly can use it to persuade other companies, even those in very different industries, to assist in lobbying efforts to prevent anti-trust laws from being enforced with regard to the monopoly or to allow it to extend monopoly to new product lines so that it will be the sole supplier of a product – a good or service – for which there are no close substitutes.[47]

[45]Nicholas J (n3)
[46]Ibid
[47]The Linux Information Project 8 April 2006 (n10)

The most effective, and less risky, way in which a monopoly can use interlocking directorships to influence the political system is to establish an interlocking directorship with a major media organization and it can be even more effective for corporations in different fields to own major media organizations, a practice which is prevalent in the USA in recent years.[48] The best known example of such an interlocking directorship in the computer field was the appointment of Melinda Gates, wife of Bill Gates, the head of Microsoft Corporation to the board of directors of the Washington Post in September, 2004. This was a very strategic move for Microsoft because the newspaper has substantial influence with politicians in Washington DC and because of Microsoft's continuing battle against attempts to effectively enforce anti-trust legislation.[49]

1.7 Effects of Interlocking Directorshipson the No Conflict Rule and Fair Competition:

As stated elsewhere in this article, there are two sides to interlocking or multiple directorship. While some scholars try to rationalize the practice, others criticize and denounce it.

1.7.1 Positive Effects of Interlocks

The major argument in favour of director interlocks is that it produces a pool of highly qualified and proficient directors to manage and superintend the affairs of companies.[50] This is more so given the complexity of modern business which demands that every effort be made to utilize the skill and ability of those who have intimate and expert knowledge of matters relating to

[48] Ibid
[49] Ibid
[50] Siaka Isaiah Idoko-Ako, 'The Concept of Interlocking Directorship under Nigerian Companies Law' LL.M Dissertation 2010, Ahmadu Bello University (Unpublished).

companies. Nicholas,[51] posits that networking is big part of a board of directors and some nominating committees in fact specifically look for board recruits who have extensive business networks that they may be able to tap into. When boards of directors who have decades of corporate knowledge and experience are brought together, the interconnected relationships can have a profound influence over people and systems. He concludes that the old adage, 'it is not what you know; it is who you know', still rings true in corporate America.

Some theorists believe that because multiple directors often have interests in firms in different industries, they are more likely to think in terms of general corporate interests, rather than simply the narrow interests of individual corporations. Also, these individuals, from wealthy backgrounds, having worked their way up the corporate hierarchy, it is most likely that they have internalized values that will cause them to personally support policies that are beneficial to business in general.[52]

1.7.2 Negative Effects of Interlocking Directorships

The Companies and Allied Matters Act, 2004 does not place any restriction on the number of directorships that may be held concurrently by any one person, although Section 281 of the Act states the fact that multiple directorships will not derogate from the fiduciary duties of a director to each company, and thus indirectly endorsing the concept. Although legal and perfectly acceptable, when different companies that a director serves are mutual competitors, the waters become murky as the competing companies may have a notable conflict of interest. As such, the issue of interlocking directorship is usually an undesirable situation for both companies and for the director.[53]

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[51]Nicholas J (n3)
[52]Mark Mizruchi (n37)
[53]Nicholas J (n3)

Most fundamentally, fiduciary duties of directors also include the duty of loyalty, which specifically requires that directors must at all times act in the best interests of the company, but directors may be involved in interlocks network in which the best interests of a company may be at odds with the best interests of another company.[54] In this situation, it would seem impossible to observe the fiduciary duties of loyalty and good faith owed to each of the companies by a director and remain undivided. In addition, there is the serious risk that the action of a director may be such as to subordinate the interest of some of the other companies on whose boards he sits to those of the other companies.

A survey of the interrelationship of large industrial companies and the city of Britain in 1973 revealed that thirty-one of the forty industrial companies had a direct link by way of interlocking directorships with one of the twenty-seven largest city companies and banks.[55] The questions that beg for answers are: what if these directors work closely together as a matter of habit? What if the same person occupies these Board positions? What must such a person or persons do if he or they learn of a corporate opportunity while not acting specifically as a director of any of these companies? If more than one of the companies is capable of taking up the opportunity, then to which must he communicate details to? According to Farrar,[56] his dilemma would seem to be insoluble and available case law does not seem to have fully and frontally addressed this problem. For instance, in *Industrial Development Consultants Ltd v Cooley*,[57] Roskill J spoke of a director's obligation as simply one to pass

[54]Ibid
[55]P Whitley, 'The City and Industry,' in P Stanworth and A Giddens (eds), *Elites and Power in British Society* (1974); Tom Hadden, *Company Law and Capitalism* (2ndedn, Weidenfeld and Nicolson 1977), 16
[56]J H Farrar and N Furey and B Hannigan, *Farrar's Company Law* (2ndedn, Butterworths 1988), 8
[57](1972) 2 All ER 162

on relevant information regarding corporate opportunity to his company. This is no help to the above situation.

Divided loyalty has been abhorred in relationships of lesser magnitude than that of director and a company. In *Hivac Ltd v Park Royal Scientific Instruments Ltd,*[58] it was held that the duty of fidelity flowing from the relationship of employer and employee may preclude the employee from engaging even in his spare time, in work for a competitor. This decision was given notwithstanding that the worker's duty of fidelity imposes lesser obligations than the full duty of good faith owed by a director or other fiduciary agent. How, then, can it be that a director can compete whereas a subordinate employee cannot?

It has long been recognized that a person who is a director of two rival companies is walking on a tight rope and at risk if he fails to deal fairly with both of them. In this regard, the remarks of Lord Denning in *Scottish Cooperative Wholesale Society (SCWS) Ltd v Meyer*,[59] a case decided under oppression remedy, are very pertinent. Three directors of a holding company, SCWS Ltd, were appointed to the board of its subsidiary textile company. Lord Denning observed that:

> *So long as the interests of all concerned were in harmony, there was no difficulty. The nominee directors could do their duty by both companies without embarrassment. But, as soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position. It is plain that, in the circumstances, these three gentlemen could not do their duty by both companies, and they did not do so. They put their duty to the cooperative society above their duty to the textile company in this sense, at least, that they did nothing to defend the interests of the textile company against the conduct of the co-operative society. They probably thought that 'as nominees' of the co*-operative society their

[58](1946) Ch 169 (CA)
[59](1959) AC 324 (HL) at 366-368

> *first duty was to the cooperative society. In this they were wrong. By subordinating the interests of the textile company to those of the cooperative society, they conducted the affairs of the textile company in a manner oppressive to the other shareholders.*

It is crystal clear from the remarks of Lord Denning that where a director serves on the boards of two or more companies whose interests are not in harmony, he will certainly find himself in an impossible position to observe his fiduciary duties of loyalty and goof faith as there will be an obvious case of divided loyalty and conflict of interests. It is submitted that the problem of divided loyalty even transcends judicial pronouncements as it has its genesis in the Holy Bible where Jesus Christ said to his disciples, "no one can serve two masters: for either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve God and Mammon."[60]

Against this backdrop, it seems impossible for a person holding interlocking or multiple directorships to discharge his fiduciary duties properly to each of the several companies he serves on their boards as director. There is greater temptation for a multiple director to abuse his position and breach his fiduciary duties.[61]

Another repercussion of interlocking directorship is that it leads to debasement of management pool. Although the "talent scarcity" theory has been developed to rationalize interlocking directorships, it has been argued that interlocks contribute to the debasement of the quality of management pool and actually decreases or restricts its size. The process of continuously recruiting directors

[60]*The Holy Bible*, Revised Standard Version (RSV), Matthew Chapter 6, Verse 24.
[61]G O Olawoyin, *Status and Duties of Company Directors* (University of Ife Press 1977), 166

from a stagnant pool of notables will leave equally or more talented but anonymous candidates languishing in the corporate banks.[62]

This pattern of board recruitment has effect on the quantity of qualified directors because it is quite possible that extensive interlocks may foreclose opportunity of younger executives gaining experience as directors, which experience they require to become skillful qualified directors.[63]

Under Nigerian corporate jurisprudence, the provision on interlocking or multiple directorship is unfortunate for two reasons. First, it is undesirable in the wake of indigenization of enterprises in Nigeria, which called for mass participation of Nigerians in business, for a handful of well-connected individuals to corner the directorships of leading companies to themselves. Secondly, in terms of efficiency, there is a limit to which even the most talented director can spread himself. The practice of interlocking/multiple directorship may, therefore, have the effect of decreasing directorial quality because a director serving on several boards of companies may be too busy to serve any one effectively and efficiently. Most fundamentally, there is a possibility of conflict of interests emerging such that the director is unlikely to have sound and balanced judgment in conflict situations.[64]

Interlocks act as communication channels enabling information to be shared between boards through multiple directors who have access to inside information for multiple companies. This system of interlocks forms a trans-corporate network, overarching all sectors of business.[65] A director who accepts a board seat for a competing company will likely gain access to

[62]Paul O Idonigie, 'Interlocking Directorates and Corporate Governance' [2004] (32) (2) International Business Lawyer, 80
[63]R P Murphy, 'Keys to Unlock the Interlock: Dealing with Interlocking Directorates [1978] (11) U Mich J Law Reform, 361
[64]Ibid (n50)
[65]Mark Mizruchi (n37)

 https://doi.org/10.53982/apblj.2018.0201.09-j

privileged information, which sets the stage for unfair competition.[66] In this connection, although interlocking directorship is normally legal except where companies are mutual competitors, it is usually undesirable because it allows companies to exchange non-public (privileged) information and, therefore, may hinder fair competition in the market place.

The pertinent question then is, how desirable is it for Nigerian company law to endorse interlocking or multiple directorship in the absence of an elaborate anti-trust law in the country to regulate the practice and prevent anti-competitive coordination between companies which would upset the stability of the financial marketplace?

1.8 Regulation of Interlocking (Multiple) Directorship

The issue of interlocking directorship is an anti-trust matter. In the USA, the Federal Trade Commission (FTC) is the federal regulating agency for anti-trust laws. Specifically, the ClaytonAct[67] prohibits board of directors from serving on more than one board within the same industry, in situations where if two companies were combined, it would prompt a situation that violates anti-trust laws.[68] Therefore, interlocking directorships that reduce competition are generally prohibited by the Clayton Anti-trust Act, 1914.

Anti-trust laws are veritable tools designed to regulate or break abusive monopolies. A monopoly is a company that is the sole supplier of a product – a good or service – for which there are no close substitutes. An abusive monopoly is one that engages in any of a variety of anti-competitive practices, including using its monopoly in one product line to establish monopoly in another product line.[69] It is generally illegal for monopolies to establish

[66]Nicholas J (n3)
[67]15 USCA §§12-27 (1914)
[68]Nicholas J (n3)
[69]Linux Information Project, 8 April 2006 (n10)

interlocking directorships that can be seen as directly serving to reduce competition and thereby increase profits.[70]

In a move towards good corporate governance, US law does not tolerate interlocking directorships. One of the most notable examples of interlocking directorates occurred in 2002 between Google and Apple, and the FTC did not sit back and watch, it acted swiftly. Eric Schmidt was the Chief Executive Officer (CEO) of Google, and Arthur Levinson was the former Chief Executive of Genentech Inc. Both men served on the boards of directors for Google and Apple. The FTC conducted an investigation pursuant to Section 8 of the Clayton Act, which investigation sought to evaluate the degree that the two companies were competing with each other regarding Apple's iPhone and Google's Android Products and other products such as netbooks. As a result of the investigation and the ensuing pressures, both executives resigned from Google's board of directors in 2009 before the matter escalated to litigation.[71]

In addition to the work of the FTC, the Institutional Shareholder Services (ISS) recommends that boards and shareholders vote against directors who serve on five (5) or more boards, which is down by one as recent as 2017. Glass Lewis is also monitoring directors who serve on multiple boards and supports executive directors who serve on no more than two boards.[72]

Furthermore, nominating and governance committees are the first gate to preventing interlocking directorship in the US. Where there is awareness, there is transparency, and where there is transparency, there is oversight. A diligent board portal system is avaluable tool for nominating and governance committees to carefully screen board candidates in a manner that prevents

[70]Ibid
[71]Nicholas J (n3)
[72]Ibid

interlocking directorships and that protects the company from unwarranted lawsuits and scandals.[73]

Turning to Nigeria, the position is different. While competition legislations have been recognized and enacted in developed countries, and some developing countries like Kenya, Cameroon, and Egypt have also taken bold steps to enact competition laws, the issue has remained a tantalizing mirage in Nigeria. Attempts at enacting a competition law for Nigeria are infinite. Several Bills have been presented to the National Assembly reflecting the multiplicity of efforts put in the process by various stakeholders, mainly from the public sector.[74] However, such bills have not been passed into law. As such, there is no elaborate federal legislation on competition. Rather, some specific sector regulatory agencies like the Securities and Exchange Commission (SEC), Nigerian Communication Commission (NCC), Nigerian Electricity Regulatory Commission (NERC) and Nigerian Civil Aviation Authority (NCAA) regulate anti-competitive behaviour in the market in their sectors.

It is submitted that Nigeria, as a developing economy, needs an elaborate competition law to regulate anti-competitive practices of companies in order to promote efficiency, encourage innovation, improve quality of products, boost choice of consumers, reduce costs and to lower the prices of goods and services. This is more so that competition ensures availability of goods and services of acceptable quality at affordable prices, and it is also a driving force

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[73]Ibid

[74]B A Adedeji, 'Towards a Competition Law in Nigeria: Why a New Federal Competition and Consumer Protection Bill May Not Fly" (2009) Cuts International, 1; Bridget Osazuwa, 'Competition Law: The Growing Need for a Federal Legislation in Nigeria [2016] (2) (1) Journal of Commercial Law, 241

for building the competitiveness of a domestic industry.[75] Competition law will check the predatory activities of companies, especially the multinational companies that might tend to be monopolistic with a concomitant effect of swallowing up or phasing out smaller companies.

The absence of a federal legislation on competition is not good for Nigeria where the establishment and promotion of Small and Medium Scale Enterprises (SMEs) is now a desideratum to help reduce unemployment and boost the economy. The law in this area is, therefore, a true challenge to the spirit of negative capitalism which closes on competition by excluding potential rivals thereby preventing improvement on new products.

1.9 Summary

This article has analysed the concept of interlocking directorship under Nigerian corporate jurisprudence and found out that its entrenchment and practice is antithesis to the no conflict rule, which is an embodiment of directors' fiduciary duty of loyalty and good faith, and to fair competition. This is because of the ills associated with it. Basically, it seems impossible for a person holding interlocking or multiple directorships to discharge his fiduciary duties properly to each of the companies he serves on their boards as director. This is more so if the companies are mutual competitors. There is greater temptation for a multiple director to abuse his position and breach his fiduciary duties.

Apart from the impossibility of observance of the 'no conflict rule' by a multiple director, corporate interlocks form a trans-corporate network overarching all sectors of business. They access non-public (privileged) information which sets the stage for unfair competition in the marketplace. In

[75] Laura Ani 'Rethinking Competition Law and Policy: Building A Framework for Implementation in Nigeria' The NIALS Journal of Business Law (Maiden Edition), 1; Bridget Osazuwa (n74)

terms of the economy, their behavior is pervasive. The ills of multiple directorship therefore, overwhelm its benefits.

Against the backdrop of the foregoing analysis, the following prescriptions are made to cushion the effects of interlocking/multiple directorship in Nigeria:

(i) The concept of multiple directorship should be jettisoned from Nigeria's companies' statute because it is antithesis to the directors' fiduciary duty of loyalty and good faith, and fair competition.

(ii) Alternatively, the law should permit the articles of association of companies to prohibit directors holding directorships in rival companies. The concept of interlocking or multiple directorship should not be extended to situations where the business of the companies is highly competitive.

(iii) In addition, the articles of companies should restrict directors from engaging in any activity which compete with their businesses by inserting a term to that effect in their service contracts. Indeed, directors' service contracts should replicate the fiduciary obligation of fidelity.

(iv) In order to tackle the problems of cross shareholdings (interlocking share-ownerships) and inter relationship in companies that give rise to interlocking directorships, the law should limit the voting rights where cross shareholdings between two companies are above a certain acceptable percentage, for example, 25 percent. In the alternative, an absolute ban should be placed by law on holding shares in a company which directly or indirectly through an intermediary of a company, holds shares in it.

(v) Parliament in Nigeria should take a bold step towards regulating anti-competitive behaviour of companies by enacting an elaborate federal competition law.

1.10 Conclusion

These recommendations are not encyclopedic or exhaustive but it is hoped that if they are adopted, Nigerian company law will make a major shift towards regulation of companies and directorial powers. This will go a long way to impact positively on the Nigerian economy as companies, as part of the macro economy, are veritable tools of wealth creation and economic growth, and their activities affect the overall national economy.