



## THE BOARD OF DIRECTORS' DUTY TO ACT IN THE BEST INTEREST OF THE COMPANY IN NIGERIA

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### INTRODUCTION

A company is an artificial person and can only act through its shareholders in general meeting or its board of directors or through officers or agents appointed by the shareholders in general meeting or the board of directors.<sup>1</sup> The Board of Directors is saddled with the responsibility of managing the affairs of the business of the company.<sup>2</sup> Given the wide powers of the board of Director, the Companies and Allied Matters Act 2020 (CAMA) as well as the Articles of Association of companies curtails the enormous powers of the board of directors by imposing various duties on directors. One of the duties imposed on the directors is the duty to act in the best interest of the company. The term “*best interest of the company*” is sometimes used interchangeably with terms like “corporate benefit”, “company benefit”, “commercial benefit” and “interest of the company”. These terms are used, essentially, in relation to the obligation of the board of director to exercise their powers for the advancement of the commercial interests of the company and its shareholders and it applies in jurisdictions where the board of directors are required to exercise their powers in the best interest of the company and its members, failing which an action may be instituted and enforced against them for breach of fiduciary duty that they owe the company.

In *Longe v. FBN Plc*,<sup>3</sup> the Supreme Court observed that a director is one who is appointed by the company “*to direct and manage the business of the company.*” In this wise, it is important to note that in directing and managing the business of the company, the directors are expected to exercise their powers and discharge their duties not only in good faith but also in the best interest of the company. In this article, we examined the scope of this duty and the factors the directors will consider in acting in the best interest of the company.

<sup>1</sup> Section 87(1) of the Companies and Allied Matters Act, 2020

<sup>2</sup> Section 87(3) of the Companies and Allied Matters Act, 2020

<sup>3</sup> (2010) 6 NWLR (Pt. 1189) 1 S.C.



## THE DUTY TO ACT IN THE BEST INTEREST OF THE COMPANY

At common law, the directors of a company were required to always take actions and decisions that would benefit the company. Accordingly, transactions which were not apparently beneficial to the company were set aside as being void as against the company. In the case of *Piercy v. S Mills & Co.*,<sup>4</sup> the English Court held that the power to issue shares in a limited company given to directors for the purpose of enabling them to raise capital when required for the purpose of the company is a fiduciary power to be exercised by them bona fide *“for the general advantage of the company.”* This principle was also emphasised in the case of *Hogg v. Cramphorn Ltd.*,<sup>5</sup> where a loan granted by the directors of a company to certain trustees to enable the trustees purchase shares in the company was set aside as the loan was not made out with the single-minded purpose of benefitting the company.

Under Nigerian law, the directors’ duty to act in the best interest of the company stems from section 305 of the of CAMA which generally provides the duties of directors. Section 305(3) of CAMA provides as follows:

*“A director shall act at all times in what he believes to be the **best interests of the company as a whole** so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances and, in doing so, shall have regard to the impact of the company’s operations on the environment in the community where it carries on business operations.”*

In *OTERI HOLDINGS LTD v. MOFTA WEST AFRICA LTD & ORS*,<sup>6</sup> the Court of Appeal stated thus: “Fundamentally, directors of a company owe a duty to the company to use their powers within the company constitution, the Memorandum and Articles of Association, in the best interests of the company....” Also, in *Haston (Nig.) Ltd. v. A.C.B. Plc*,<sup>7</sup> the court held that “a director of the company has a duty to act in the best interest of the company.” Unfortunately, these decisions made no further pronouncements on the contents of the duty to act in the best interest of the company. There appears to be no decision of the Nigerian court on the criteria for determining whether a

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<sup>4</sup> [1920] Ch. 77

<sup>5</sup> [1966] 3 All ER 420

<sup>6</sup> (2021) LPELR-54853(CA)

<sup>7</sup> (2002) FWLR (pt. 119) 1476 at 1492. See also *Artra Industries Nig. Ltd. v. Nigerian Bank for Commerce and Industry* (1998) 3 SCNJ 97 where the Supreme Court held that the directors of the respondent were entitled to refuse to grant the permission for the further mortgage, since the law requires directors to act in the best interests of the company.

decision of the board of directors of a company has been made in the best interest of the company. It is therefore far from clear what is meant by the “**best interests of the company as a whole.**” In a bid to determine what constitute “**in the best interest of the company**”, recourse would be made to the interpretation of this phrase by courts of the United Kingdom (UK) where the phrase “**in the best interest of a company as a whole**” has been given due consideration.

The traditional view, supported by English case law is that the best interests of the company should be treated as being the economic interests of the shareholders collectively, unless the solvency of the company is at issue, when the interests of the company may give paramountcy to the interests of creditors. In **Parke v. Daily News**,<sup>8</sup> a case that dealt with a decision by directors to make gratuities to the employees, to the detriment of shareholders. Plowman J stated that employees’ interests should not be considered ahead of the interest of “the company as a whole.” The court defined “the company as a whole” to mean the “shareholders as a general body.” In the case of **Brady v. Brady**,<sup>9</sup> the court also held that the interests of a company, as an artificial person, cannot be distinguished from the interests of the persons who are interested in it. From these decisions, the interests of shareholders are the primary concern of directors in acting in the best interest of the company. This does not refer to the individual interests of shareholders but their interests as a collective group of people.



In the UK, directors are expected to act primarily in the interest of the shareholders as a whole. In **Piercy v. S Mills & Co**,<sup>10</sup> the English Court held that the power to issue shares in a limited company given to directors for the purpose of enabling them to raise capital when required for the purpose of the company is a fiduciary power to be exercised by them bona fide for the general advantage of the company, and when the company is in need of further capital, directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control, or the control of themselves and their friends, over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. This long-standing obligation of the directors to act in the best interest of the shareholders as a whole was revamped in the UK Companies Act of 2006 with the introduction of a new requirement that directors should have regard to the interest of different stakeholders. Section 172 of the UK Companies Act 2006 provides that a director must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In so doing, the director must have regard (among other matters) to:

- a. the likely consequences of any decision in the long term;
- b. the interests of the company’s employees;

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<sup>8</sup> [1962] Ch 927

<sup>9</sup> [1988] B.C.L.C. 20 at 40, CA

<sup>10</sup> *supra*

- c. the need to foster the company's business relationships with suppliers, customers and others;
- d. the impact of the company's operations on the community and the environment;
- e. the desirability of the company maintaining a reputation for high standards of business conduct; and
- f. the need to act fairly as between the members of the company.

Though, the scope and extent of the duty of directors in Nigeria to act in the best interest of the company is not defined, certain factors must be taken into consideration in performing this duty. Section 305 of CAMA requires the directors to have regard to the impact of the company's operations on the environment in the community where it carries on business operations. This requirement to consider the environmental impact of the operations of the company aligns with the global trend for companies to have and comply with environmental, social and governance framework. In addition to the requirement to consider the environmental impact of the operations of companies, **section 305(4) of CAMA** provides that *"The matters to which a director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members."* Accordingly, directors in Nigeria are to consider:

- a. the impact of the operations of the company on the environment;
- b. the interests of the company's employees in general; and
- c. the interests of its members.

Clearly, it is mandatory for the directors to actually advert their minds to these factors as the law allows the directors no prerogative. However, the director may consider other factors in addition to the factors listed above. This is because the use of the word "include" in section 305(4) of CAMA suggests that the directors may consider other matters they deem appropriate such as the interests of customers and creditors. The best interests duty is one of the most important duties and obligations placed on directors. This duty ensures that the director of a company is making decisions and business judgements that will be of benefit to the company as a whole taking into consideration factors such as the interest of the employees and the environment.

## CONCLUSION

In the light of the express provision of section 305 (3) of CAMA, which imposes a duty on directors to exercise their powers and discharge the duties of their office, *"in the best interests of the company,"* directors should ensure that transactions involving the company provides commercial benefits to the company, otherwise consents of the shareholders should be sought and obtained by way of shareholders resolution. This concept does not however, negate the requirements that all transactions must be permitted in the object clause of the company and directors must always, act in good faith and in the best interest of the company.

**For further enquiries, please contact:**



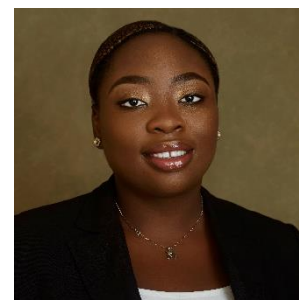
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