THE PRINCIPLES IN THIRD PARTY TRANSACTIONS AND INSIDER DEALINGS: AN EVALUATION OF RECENT LEGAL ISSUES *

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Abstract
A company is a legal and juristic person capable of bearing rights and duties equivalent to those of human beings. It becomes an artificial legal entity once the formal process of bringing it into existence has been complied with. In essence, it is a legal personality created by a process other than “natural birth”. Having been cloaked with personality, it is deemed to be a separate and distinct entity from its cooperators. Despite being fitted with the toga of personality however, a company is admittedly an artificial person, a legal fiction which perfors has to operate through the medium of human being in accordance with provisions of the Company’s Constitution, the Memorandum and Articles of Association. In recognition of this fact, the courts have continually reiterated that a company must act through natural persons who form its vital organs and who must be deemed to be the company itself to all intents and purpose. This paper sets out to identify those human beings who have the responsibilities of piloting the affairs of a company. Having identified them, efforts will be made to see their relationship with each other all with a view to seeing to what extents a third party who deals with them can reasonably be assured of protection under the law and concludes by recommending the need to amend some of the laws that affect the subject matter of this write-up.

1 Damola Aderemi: A Rationale of the exercise of Management Control by Company Directors Journal of Business and Property Law 75 Vol. 2 No. 10.
5 Bolton (Engineering) Co. Ltd. v Graham (T.J.) & Sons (1957) 1 QB:159.
Introduction

It is trite law that a company is a juristic person with attendant legal rights and duties, yet it must act through a natural being that form its vital organs. The organic theory based on the role of human beings in the corporate setup was first propounded by Lord Viscount Heldane in Lennard’s Carrying Co. v Asiatic Petroleum. In that case, a company which owned a ship was seeking to take advantage of the limitation of liability under Section 502 of the Merchant Shipping Act 1894. This limitation is available only where the injury is caused without the owner’s actual fault. The loss resulted from the default of Lennard, its managing director, and in holding the company liable, Viscount Heldane L J said:

“My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of corporation, the very ego and centre of the personality of the corporation … if Mr. Lennard was the directing mind of the company, then his action must unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of Section 502…”

The Lennard’s case was followed in H.M.S Truculent where the Third Sea Lord was held to be the directing mind of the Admiralty. In what will appear to be a graphical illustration of this theory, Lord Denning stated in Bolton Engineering Co. Ltd v Grahen:

“A company may in many ways be likened to a human being. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre ..some others are directors and manager who represent the directing mind and will of the company and control what it does. The state of minds of these managers is the state of mind of the company and is treated by the law as such”.

The Nigeria Supreme Court gave judicial approval to the applicability of this theory in the case of Trenco Nig. Ltd v African Real Estate where Aniagolu JSC (as he then was) noted that the corporation can be likened to human being capable of acting only through its human agents.

Who are these human agents?

The organic theory based on the role of human beings in the corporate set up as encapsulated in the Dictum of Lord Viscount Heldane and Lord Denning is now well entrenched in company law so that the acts of these human beings are deemed to be the act of the company. Yet it is not all human beings who find themselves within the corporate set up that can be seen to be the directing mind and will of the company as to bind the company and or have their acts or knowledge attributed to the company.

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7 1915 AC 705.
8 At pages 713- 714.
9 1952 P.1
10 1957 1 QB 159 at 172-173.
12 Lennard’s Carrying Co v. Asiatic Petroleum. Supra note 6, Pg. 2.
13 Bolton (Engineering) Co. Ltd. v Grahen & Sons Supra note 10. Pg. 2.
14 See Moore v Bresher Ltd. (1944) KBV 551, Ladejobi v Odutola Holdings Ltd (2002) 3 NWLR (pt. 753) 121 CA.
Two main groups in the corporate set up qualify for recognition as the directing mind and will of a company. These are the shareholders in general meeting and the board of directors. In actual fact, the management powers vested in both the shareholders in general meeting and the board of directors appear mutually exclusive\textsuperscript{15} and the issue has always been who is responsible for the greater role in the steering of the affairs of the company.

**The Shareholders in General Meeting and the Board of Directors – the Battle For Supremacy**

At common law, up to the 19\textsuperscript{th} century, the general rule was that the directors were under the complete control of the members in general meeting. The notion then was that the shareholders who were seen to be “owners” of the companies ought to be in control and having only appointed directors as a matter of convenience, the later is only acting on behalf of the shareholders.

The position was confirmed in the case of *Isle of Wright Railway Co. v Tahoudin\textsuperscript{16}* where it was held that members in general meeting could pass a resolution empowering them to interfere with the ways the directors manage the company. A similar decision was also reached in *Marshal’s Valve Geer Co Ltd v Manning Wardle\textsuperscript{17}*. The above view however became out dated over time. As a growing realization of the role of directors as commercial men imbued with business acumen began to be felt, the need to ensure that their powers of management were protected and remained sacrosanct, became more and more obvious. It was thought that shareholders cannot interfere with the exercise of those powers given to the directors by the Articles of Association, or the Act (either expressly or impliedly). At best it was thought, what shareholders can do (as they are entitled to) was to pass a resolution to remove the recalcitrant director. The philosophy is that professionalism should be allowed to thrive so that the directors whom the shareholders deemed fit to employ ought to be given the chance to perform.

This modern view informed the decision of the court in *Automatic Self Cleansing Filter Syndicate Co. Ltd v Cunninghane\textsuperscript{18}* where the court did unequivocally state that the division of powers between the board of directors and the company in general meeting wholly depended on the construction of the Articles of Association.

According to Greener L.J. in *Shaw and Sons (Salford) Ltd. v Shaw\textsuperscript{19}*

“A company is an entity distinct alike from its shareholding and its directors. Some of its powers may, according to its articles be exercised by directors; certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the powers vested by the articles in the directors is by; 1) altering their articles or (2) when the opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the

\textsuperscript{15} See *Automatic Self Cleansing Filter Syndicate v Cunninghame* (19-6) 2 Ch. 34.

\textsuperscript{16} 25 CH.D 320

\textsuperscript{17} 1909 1 Ch. 267.

\textsuperscript{18} Supra Note. 15, Pg. 3.

\textsuperscript{19} 1935 3 KB 113 at 153.
directors can usurp the powers vested by the articles in the general body of shareholders.”

This modern view however admits of the facts that apart from the duties conferred on it by the Act and the Articles of Association, the shareholders have additional powers to act;

a) Where there is deadlock and the board of directors cannot act as was the case in Barron v Potter21.

b) Where effective quorum cannot be formed as was the case in Foster v Foster22.

c) Where directors are disqualified from voting23.

d) Where the directors fail to commence proceedings24.

In Nigeria, prior to the enactment of the Companies and Allied Matters Act 199025, the provision of Article 80 Table 1 of part II of the Companies Act 1968 regulated the exercise of powers of the company and operated automatically in the absence of any contrary provision in the company’s article. It provides as follows:

“The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and registering the company and may exercise all such powers of company as are not only by the Decree or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of directors which would have been valid if that regulation had not been made”.

The wordings of the above provisions generated a lot of controversy as to the scope of the powers of the board of directors.

Sullivan has posited26 that Article 80 is a compromise between securing some degree of directorial autonomy and preserving the residual authority of the general meeting as the Supreme organ of the company.

Under the CAMA, the issue of corporate control and management is well stated in Section 6327

1) “A company shall act through its members in general meeting of 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 Director;

2) Subject to the provisions of this Act, the respective powers of the members in general meeting and the Board of Directors shall be determined by the company’s article;

3) Excepts as otherwise provided in the company’s article, the 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 meeting;

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20 See also: Quin and Axtens v Salomon (1990) AV. 442; Scott v Scott (1943) 1 ALL ER 582: Bamford v Bamford (1970) CH 212.

21 (1914) 1 CH 985.

22 (1916) 1 CH 532.

23 Grant v. UK Switchback Railway.


26 The relationship between the Board of Directors and General Meeting in limited companies 1977, 93 LQR 569 at 572-573.

27 Section 63 Companies and Allied Matters Act CAP C20 LFN 2004.
4) Unless the articles shall otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the Articles, shall not be bound to obey the directions or instructions of the members in general meeting: Provided that the directors acted in good faith and with due diligence.

5) Notwithstanding the provisions of subsection (3) of this section, the members in general meeting may:
   a) Act in any matter if the members of the board of directors are disqualified or are unable to act because of a deadlock on the board or otherwise;
   b) Institute legal proceedings in the name and on behalf of the company, if the board of directors refuse or neglect to do so;
   c) Ratify or confirm any action taken by the board of directors regarding action to be taken by the board;

6) No alteration of the articles shall invalidate any prior act of the board of directors which would have been valid if that alteration had not been made.”

The Court in Ladejobi v Odutola Holdings Ltd28. erased any possible controversy about the above provision when it stated as follows:

“A reading of Section 63(3) of CAMA, conjunction with Section 63(5) will show that power by virtue of Section 63(3) of the Act, the power to manage the business of a company is vested in the board of directors nevertheless, the general meeting retains the power to determine whether legal proceedings may be instituted in the name of the company. In other words, whereas Section 63(3) places the management of the general business of the company on the board of directors 63(5) puts the specific items of whether to institute legal proceedings in the name of the company under the exclusive control of the members sitting at a general meeting”.

In its exercise of the management functions of the company, the board of directors on behalf of the company can enter into transactions with a third party.

Who is a Director?
Section 395(ii) of the Companies Act 1968 merely defined a director as including “any person occupying the position of director by whatever name called”.

While this definition highlights the fact that directors invariably bear other apppellations, it was a circuitous definition which was largely unhelpful and hardly threw any light on the questions29.

Section 244 CAMA30 defines a director as “a person duly appointed by the company to direct and manage the business of the company”. Section 244(2) provides that where a person deals with a company, there is a rebuttable presumption that those described by the company as directors have been duly appointed.

Section 244(3) provides that a person not duly appointed as a director by the company and who holds himself out as such shall be guilty of an offence and on conviction liable to imprisonment for two years or a fine of N100 for each day he holds himself out or both. He can also be restrained by the court.

28 Op Cit Note 14 Page 3.
Where however, it is the company that holds him out, such company will by virtue of Section 224(4) be liable to a fine of N1000 for every day he is so held out and both can be restrained by any member until he is duly appointed. The Act also provided for shadow directors who pull the management strings from outside the board and on whose instructions the appointed directors are accustomed to act.

The exercise of powers and control in a corporate set up may not be a simple thing to a third-party. The real difficulty is that there may be some irregularity in the operations of the organ concerned. The general or board meeting may not have been convened on proper notice, a quorum may not have been formed, or a resolution may not have been properly put or carried; the board may have delegated exclusive authority to a managing director or the directors acting as the board may not have been properly appointed.

It will generally suffice to state that when these human beings act as agents of the company, (the principal) the later can only be liable if the agent is doing:

i. What he is actually authorized to do;

ii. What an agent of that type would normally have authority to do or;

iii. What he has been “held out” by the principal as having authority to do, provided that in cases of (b) and (c) the other party to the transaction did not know that the agent was exceeding his actual authority.

A party may therefore allege that he had acquired rights against the company as a result of the action of the company in general meeting, or of the acts of its board of directors, only if they are within the powers of the company under its statute, charter or memorandum and if the responsible agencies of the company are acting within the scope of their authority.

**Third Party and the Internal Regulations of a Company**

In *Royal British v Turguard* where under the registered deed of settlement the board of directors were authorized to borrow on bond such sums as should from time to time be authorized by a resolution of the company in general meeting. The board borrowed money from the Bank on a bond bearing the company’s seal. It was held that even if no resolution had in fact been passed by the company in general meeting, the company was nevertheless bound.

Here Jervis CJ stated:

“We may now take for granted that the dealings with these companies are not like dealing with the partnership and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party herein on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by resolution, he would have a right to infer of a resolution authorizing that which on the face of the document appeared to be legitimately done.”

The case was indeed a landmark decision wherein the directors authority to borrow was expressly made subject to the consent of the company’s general meeting, a situation which ought ordinarily to put a third party on inquiry. Yet it was held that since under the deed, the directors

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31 See Ejekam v Devon Indu Ltd. (1998) 1 NWLR (Pt. 534) 417.
32 Section 245 (1) CAMA 1990.
33 34 (1856) 6 E & B 327.
35 The Forerunner of the Modern Memorandum and Articles.
36 At P.332.
might have had authority, the third party was entitled to assume that they in fact had authority. As stated by Prof. Gower\textsuperscript{37} the rule is manifestly based on business convenience, for business could not be carried on if everybody who had dealings with company had meticulously to examine its internal machinery in order to ensure that the officials with whom they dealt with had actual authority.

**Position under Companies and Allied Matter Act, Cap C.20 LFN 2004.**

The relevant Sections are Section 65 and Section 70. Section 65 provides as follows:

“Any act of the members in general meeting, the board of directors, or of a managing director while carrying on in the usual way, the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person”.

The above clearly depicts the common law rule where a person is acting in the ordinary course of business for the company\textsuperscript{38}. Thus in *Orji v Anyaso*\textsuperscript{39} the court observed:

“Generally, an agent who is acting on behalf of a disclosed principal is not liable in contract to a third party for any breach arising from the contract. But to amount to agency that can bind the principal, the agent must be conferred with authority, either express or implied”.

It is particularly instructive to note that the above section recognizes the office of a managing director as a separate organ. Hence in *Spasco Vehicle & Plan Hire Co v Alrine Nig Ltd*\textsuperscript{40}, the court noted:

“A Managing Director of a company is generally invested with apparent authority to carry on the company’s business in the usual way and to do all acts and enter into all contracts necessary for that purpose. Therefore, if a person is held out by a company to be a Managing Director, any body dealing with him as agent of the company can assume that he has power which an agent of that kind normally has and the company is stopped from denying that this is so”.

Also in *Faith Enterprises Ltd v Basf Ltd*\textsuperscript{41}, the court stated:

“The state of mind and the acts of a managing director of a company are all regarded as those of the company”.

Yet the liability of a company under section 65 of CAMA is not ad-infinitum. This is by virtue of the proviso to the Section which excludes liability on the part of the company.

a. If the third party has actual knowledge at the time of the particular transaction;

b. That the general meeting, board of directors, managing director as the case may be had no power to act in the matter;\textsuperscript{42} or

c. had acted in an irregular manner or if having regard to his position with or relationship to the company he ought to have known of the absence of such power or to the irregularity.

\textsuperscript{37} Gower and Davisi Principles of Modern Company Law, (7\textsuperscript{th} ed. Asia, Sweet & Maxwell), 203, Pg. 135.

\textsuperscript{38} Wattaeu v Fenwick 1983 1 QB 346, 67.


\textsuperscript{40} (1998) 8 NWLR (Pt. 416) 655.

\textsuperscript{41} (2001) 8 NWLR (Pt. 714) 242.

\textsuperscript{42} Haward v Patent Ivory Manufacturing (1888) 38 CH.D. 156.
A company who is otherwise liable cannot put a defence of ultravires with a view to escaping liability because section 65(b) outrightly forbid that defence. Outside these organs listed in Section 65 above, acts of other officers or agents of a company can bind a company only if:

i. The company acting through its members in general meeting, board of directors, or managing director, shall have expressly or impliedly authorized such officer or agent to act in the matter; or

ii. the company, acting as mentioned in (i) above shall have represented the officer or agent as having its authority to act in that matter in which event the company shall be civilly liable to any person who has entered into the transaction in reliance on such representation unless such person had actual knowledge that the officer or agent had no authority or unless having regard to the position with or relationship to the company, he ought to have known such absence of authority.

Section 66(2) recognizes the common law mode of creation of authority on an agent by the principal which may be before the act or by subsequent ratification. It also includes the fact of knowledge and acquiescence of the act by the organs as immediately they became aware, they did not take steps to stop the act, the company will be liable on ground of inaction which will be deemed to be ratification.

Section 66(3) however safeguards the common law principle of vicarious liability of the company for the acts of its servants while acting within the scope of his employment which cannot by reason of Section 66 be set aside.

Also by virtue of Section 67 CAMA, except in certain situations where an officer or an auditor may be exempted or indemnified, such officer or auditor cannot exclude himself from liability “by contracting out of it in respect of any negligence, default, or breach of trust of which he may be guilty.

Section 68 and 69 abolished constructive notice and codified the rule in Turquand’s case

Section 68 provides:

“Except as mentioned in Section 197 of this Decree, regarding particulars in the register of particulars of charges, a person shall not be deemed to have knowledge of the contents of the memorandum and articles of a company or of any other particulars, documents, or the contents of documents merely because such particulars or documents are registered by the commission or referred to in any particulars documents so registered, or ore available for inspection at any office of the company”.

Section 69 provides that any person having dealings with a company or with someone deriving title under the company shall be entitled to presume that:

a) the company memorandum and articles of association has been duly complied with;

b) everybody described in the particulars filed with Corporate Affairs Commission has been duly appointed and has authority to exercise or carry out business customarily exercised by an officer or agent of that type;

c) the secretary of the company or other officials having authority to issue documents on behalf of the company has authority to warrant the genuineness of the documents and the accuracy of the copies issued.

42 Section 66.
44 Freeman & Lockyer v Buckhurst Patent Properties supra & Hely – Hutchinson v Bray Heed Ltd supra.
45 See 67 (2) and 631 CAMA. Cap C.20 LFN 2004.
d) A document has been duly sealed by the company if it bears what purports to be seal of the company attested by what purports to be signatories of two persons who, in accordance with paragraph (b) of this section can be assumed to be a director and the secretary of the company;

There are however situations where he cannot presume that there is regularity, that is,

(i) If he had actual knowledge to the contrary or if having regard to his position with his relationship to the company, he ought to have known the contrary.

(ii) Statement in the Articles of Association to the effect that authority to act in a matter may be delegated to a committee or to an officer or agent would not on its own entitle a person to assume that such has been done.

Section 70 further provides that except where there is collusion between the officer or agent of the company and the third party, the defence that an officer or agent of the company has acted fraudulently or forged a document purporting to be sealed by or signed on behalf of the company will not prevent the company from being liable to a third party. In effect, the company will still be liable even if forgery or fraud on the part of its officers or agents is proved.

The company can only escape liability by showing the court:

That the third party actually read their public documents and was aware that it does not have the power to enter into such contracts. In essence, the company must prove actual notice, since Section 68 of the Act has abolished the doctrine of constructive notice or registered document of companies.

The company’s position is made weak by the fact that Section 69 provides presumption of regularity hence the company need not say that the transaction had not been decided on by the directors of the company, since it will be safely assumed by the third party.

In the same vein, a third party when sued by a company cannot use ultra vires as a shield because Section 39(3) provides that even if a company engaged in an ultra vires act, it will not be declared invalid, hence the third party will be stopped from relying on it.

In practice, list and particulars of Directors in the prescribed form CO7 together with their consent, form part of documents registered and open for public inspection.

**Insider Dealings**

The principle of Insider Dealing which is the second part of this paper is an extension of the duties of directors, shareholders and other persons concerned to protect any unpublished price sensitive information which is capable of negatively affecting the company’s securities if leaked.

It talks about the insider’s liability to those investors who have suffered a loss and the liability of the insider to the company itself and the purpose of a study in insider trading are to promote compliance with applicable security laws by various companies.

**Inside Information**

Inside information is any non-public information that a reasonable investor is likely to buy or sell stock or other securities. This include any confidential information, whether technical, commercial, financial or otherwise, which could affect the price of securities or those of any other company with which a member of the company does business such as customers or suppliers. Inside information could include confidential information about a pending merger or acquisition, the award or termination of a substantial contract, a major lawsuit, the gain or loss of a major customer or supplier or the occurrence of insolvency.

46 Section 69 (d)(1).
47 Kredit Cassel v Schenkers supra.
48 See Percival v Wright (1902) 2. Ch. 421
Types of insider trading:

a) Silent insider which merely has an informational advantage which prompts his trading behaviours, and

b) Manipulative insider trading which on the contrary gains not only for his informational advantage but also form his biased messages which are likely to affect the public opinion since the manipulators have high credibility and good reputation. This implies that the manipulators do not have to be an insider. A manipulator is a credible agent whose reputation derives from his good research and informed prediction.

In some advanced countries, certain rules\(^49\) regulate the markets and require it to enforce these rules internally. Such rules are imposed on their fair value. That fair value is in turn biased, inter alia, on the transparency of the information available to all holders of securities. If some have inside information, their trading strategy will be biased and the market will suffer. It is therefore imperative to avoid insider trading, this means that you must not buy or sell Stock or other securities of any company while in possession of inside information about that company. You must also ensure that you do not disclose any inside information to any third party as this would enable that person to buy or sell stock or other securities of the company on the basis of the disclosed information.

The relevant provisions in Nigeria on this principle of law are mainly Part X of Investments And Securities Act 1999 and also Security Exchange Commission Act 1988 particularly Sections 15 & 29. The relevant sections in the Investments and Securities Act are mainly the same content as Part XVII Chapter 5 Companies And Allied Matters Act except for some few modifications. Part X Sections 88 – 98 ISA is supplementary to the provisions of Section. 15 of Security and Exchange Commission Act 1988 which empowers the Commission to call for information for the proper protection of investors and to ensure fair dealing in securities transactions.

Insider trading is defined by Section 29 of the Act as occurring where a person or groups of persons who are in possession of some confidential information and price sensitive information not generally available to the public utilize such information to buy or sell securities for the benefits of himself, the group or any other person. An insider is defined inter alia in Section 95 (2) as an individual who has at any time in the proceeding 6 months, been knowingly connected with the company.

An individual is connected with a company if

- (a) He is a director of that company or a related company.
- (b) He occupies a position as an officer (other than a director) or employee of that company or a related company or a position involving a professional or business relationship between himself (or his employer or a company of which he is a director) and the first company or a related company which in either case may be reasonably be expected to give him access to information which, in relation to securities of either company is unpublished price sensitive information, and which, it would be reasonable to expect a person in his position not to disclose except for the proper performance of his functions – Sections 95 (2) (b) (i) & (ii) ISA

Going by this definition, six categories of persons are classified as insiders. These are:-

- (a) Directors of the company whose securities are in question
- (b) Directors of companies related to the first one

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\(^{49}\) E.g. The Dutch Autoriteck Financieele Marktten, (“AFM”), The French Autorite’ des marches financier (“AMF”), The German Bundesanstalt feir finanzdienstlistungsaufsicht (“Bafin”), The Spanish Comision Nacional del Mercado de valores (“CNMV”). S
(c) Officers or employees of the first company (not being directors)
(d) Officers or employees of related companies (not being directors)
(e) Professional working for the first company or related companies
(f) Persons who have business relationships with the first company or related companies.

Section 88 (2) and (3) ISA seems to covers persons receiving unpublished price sensitive information without being connected to the company or a company related to that company directly.

Any reference to unpublished price sensitive information to any securities of a company is a reference to information which –

(i) Relates to specific matters relating or of concern (directly or indirectly) to that company, that is, is not a general nature relating or of concern to that company, and

(ii) Is not generally known to those persons who are accustomed to or would be likely to deal in those securities but which would, if were generally known to them be likely material to affect the price of those securities.

This statutory definition of unpublished sensitive information is somewhat confusing and liable to be unduly extended. The fluidity of the provision affords the Commission an opportunity to envelope the slightest ambiguous use of information in the name of insider trading. However, Section 90 of ISA which is principally the same content as Section 617 of CAMA provides a situation where a person in use of an unpublished price sensitive information will not be held guilty of Insider Dealings/Trading i.e. where the possession of such information is obtained from doing an act without the aim of making profit or avoiding loss or where the act is done in good faith as a liquidator, receiver or trustee in bankruptcy or as a stockbroker or where it is reasonably obtained by a person in good faith in the ordinary course of his business. This provision has been criticized as being illusory by virtue of the fact that every act done at the capital market is directly or indirectly geared towards making profit or avoiding loss. The key to liability under the dealing/trading is knowledge of the sensitivity of the information obtained. The medium of eliciting the information is not important. The pity of this provision is the difficulty of proof of knowledge. This is the same problem faced by penal provisions requiring specific mental element for any act or omission. This singular problem may entirely remove the protection accorded investors under the heading or considerably whittle down its effects.

A curious provision on Insider Dealing/Trading is Section 92 of ISA which provides that “No transaction shall be void or voidable by reason only that it was entered into in contravention of Section 88 and 89 of the Act” One cannot help but wonder why such transactions are made valid under the law. It may have been to protect the interest of any innocent third party involved in the transaction.

Section 97 ISA has a soothing effect on any aggrieved party who may have felt Section 92 ISA had made the insider escape in spite of his misconduct. The section has the power to make the insider liable for all the benefits derived from the transaction. It can also make him liable for damages and loss incurred.

In addition to this civil liability, any offender who contravenes Sections 88 and 89 of ISA will face a penal sanctions of 2 years or a fine of N5000 or both. Section 96 provides that any person who contravenes Part X of the law commit an offence and is liable on conviction in the case of

50 Akande B.O And Sanga B; “Unit Trust Schemes: Law and Practice” Prepared for Center for Business and Investment Studies Limited Lagos.
an individual to a fine of not less than N500,000 or to imprisonment for a term of 7 years or in
the case of a body corporate to a fine of N1,000,000.

An aggrieved investor or company who wishes to sue to recover losses incurred or secret profits
made, is expected to commence action for recovery after the expiration of two years after the
date of completion of the prohibited transaction\(^{51}\). Section 98 ISA appears confusing. Probably
the draft man meant “this part” and not “this section”. This is because no cause of action is
created by the section. One wonder why an aggrieved party has to wait till the expiration of 2
years after the completion of the transaction before taking an action.

Some of the few modifications made on CAMA in ISA on Insider Dealing apart from the ones
already mentioned above are as follows:

1. While Part V on Insider Trading in CAMA is titled “Insider Trading”, the relevant part
on Insider Trading in ISA i.e. Part X is titled as “Trading in Securities” This has been
criticized as inappropriate, because, the meaning giving to “Trading in Securities” in the
definition section does\(^{52}\) not tally with the content of the part. It is suggested that the part
should be given its old title which is “Insider Trading”

2. While Part V in CAMA started with a definitive section, the definitive section in Part X
of ISA is towards the end of the part.

3. Section 616 (5) made the power of the minister to make an order declaring a person to be
a public officer for the purposes of subsection (4) to be exercisable by statutory
instrument. This is not so in ISA. ISA is silent as to this regard\(^{53}\)

4. Section 97 ISA states that the insider shall be made to pay compensation at the order of
the Securities and Exchange Commission or the Investment and Securities Tribunal.
Section 620 CAMA only says that the offender will be made to compensate but never
mention any institution responsible to make the order for compensation.

**Conclusion**

It is agreed worldwide that one of the most glaring threats to the Securities market is the issue of
insider trading; accordingly, the control of insider trading is an area of securities regulation
pioneered by the United States of America,\(^{54}\) although neither the disease nor the cure is of
purely American Origin. While the USA has experienced over six decades of intensive insider
trading regulations, France has only 3 decades of experience both Britain and Federal Republic
of Germany have two decades each Nigeria has just joined the bandwagon. To deal with this
problem effectively, countries must allow free flow of transparent information. Thus the Law
must continue to expand the scope of areas of disclosures. There is nothing like too much
information with regards to investments. Even in the public sphere, effective
administration is greatly helped by transparent disclosures and dissemination of information.\(^{55}\)

According to *David Partlett*,\(^{56}\) there are over one hundred statutes that criminalize the false
reporting of information to endorse disclosure. Courts are demanding disclosure of increasing
qualities of sensitive and valuable information held by companies.\(^{57}\) The task for Corporate

\(^{51}\) S98 ISA 1999

\(^{52}\) S28 ISA 1999

\(^{53}\) S89 ISA 1999

\(^{54}\) S98 ISA 1999

\(^{55}\) S28 ISA 1999

\(^{56}\) S89 ISA 1999

\(^{57}\) Paul L. Davies; Gower’s Principles of Modern Company Law 6th Ed. (London, Sweet & Maxwell) Pg. 446. For
current position, Gower referred to Loss and Seligman; Fundamentals of Securities Regulation 3rd Ed. (Boston;
Mass) Pgs. 759-875.
Affairs Commission, the Securities and Exchange Commissions is indeed formidable, consequently enlightened investors would always endeavour to assess the competence of such regulatory bodies in taking decision on where to put their money.

It should however be noted that by the promulgation of ISA and particularly Part X, Part V of CAMA becomes automatically repealed\(^58\). The risk of release of price sensitive information to foreign investors by Nigerian surrogates is so high that the Securities and Exchange Commission ought to scrutinize sudden investments moves in this area to ensure that they are done in good faith. A delicate balancing act is called for. One is in the need to stimulate foreign investment while the other is the protection of vulnerable unsuspecting Nigerian investors. The provisions of Investments and Securities Act 1999 should be amended and made to be in accord with ordinary human reasoning particularly in relation to Section 98 of the Act. It is so interesting and satisfying to know that the ISA is presently under review to amend the anomalies in the law.

In conclusion, in spite of hard work of legislative drafters to put together the provisions of Part X of ISA, it is very disappointing to discover that the strength of provisions of that part of the law to indeed succeed in protecting company’s securities has never for once been tested in the law court. There is no doubt that the whole concept and rules above stated is based on business efficacy and convenience. There cannot be a better way to ensure that companies continue to carry out their functions as a going concern just as third parties are reasonably assured that their dealings with the company through their agents will not be defeated.