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Directors as Trustees of Company's Powers and Properties: Understanding the Justification for Fiduciary Duties

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Abstract
Directors are trustees of their companies, with the effect that they stand in a fiduciary relationship with the companies and, *ipso facto*, owed to the companies the fiduciary duties of no conflict of interests and no self-profit. Directors' fiduciary duties and legal consequences for breach are articulated in case law and provided in statutes of common law jurisdictions such as Nigeria and the United Kingdom. However, it is not self-evident why directors are thrust into a fiduciary relationship, and the justification for their fiduciary duties to the company. This article seeks to establish a functional basis for understanding the fiduciary concept, and the justification for the duties that flow from relationships that answer to the definition or description of a fiduciary. In particular, this article probes a juridical justification for fiduciary duties of company directors.
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1. Introduction

An incorporated company is a separate legal entity from its owners or shareholders, including those who act on its behalf and manage its business, such as directors, managing directors and other officers[1]. The implication of the concept of separate legal personality of a company is that like independent natural persons the company has its own powers as spelt out in its memorandum of association, and the capacity to acquire and hold properties in its own name. According to Lord Halsbury LC in the landmark case of *Salomon v Salomon & Co Ltd*[2], a registered company is to be treated ''like any other independent person with its rights and liabilities appropriate to itself''.

The case of *Salomon v Salomon & Co Ltd* established the judicial precedence for the legal separation and independence of a company and its shareholders such that, when the company acts it does so in its own right. The shareholders of the company are not liable for the company's actions or obligations, nor do they have any proprietary interest in the company's properties. The implication of the concept of separate legal personality of a company is succinctly captured in the words of Lord Sumner in the case of *Gas Lighting Improvement Co Ltd v Inland Revenue Commissioners*[3];

> Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders.

Instructively, though the company has its own separate rights, powers and properties different from its shareholders, however, for the purpose of its object of incorporation it can only function through natural persons. The separate legal personality of the company is merely a fictional personality because the company does not possess a human mind to think and make decisions, or human hands to physically carry out its business operations. A company therefore relies on natural persons as its ''brain and nerve centre which controls what it does, and as its hands which hold the tools and act in accordance with the direction from the nerve centre''[4].

For functional purposes, directors are the brain and nerve centre of the company; they constitute the alter ego of the company in that they exercise corporate powers on behalf of the company and manage the company's business, including the maintenance of the assets or properties of the company. Accordingly, from the early periods of the development of company law directors have been described as trustees of the powers and properties of the company[5]. As trustees of the company, directors therefore occupy a fiduciary relationship with

[1] The separate legal personality of a registered company was firmly conceptualized in the seminal case of *Salomon v Salomon & Co Ltd* [1897] AC 22
[2] ibid
[3] (1923) AC 723 at 740 – 741
[4] According to Lord Denning in the case of Bolton Engineering Co. Ltd v Graham & Sons (1934) 1 K.B 57; ''Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company on what it does''.
[5] See the cases of *Charitable Corporation v Sutton* (1742) 26 ER 642; *Bray v Ford* [1896] AC 44; *Boardman v Phipps* [1966]; *Re Lands Allotment Co* [1894] 1 Ch 616; *Imperial Hydropathic Hotel Co. Blackpool v Hampson* (1882) 23 Ch D 1

the company, and as such they are expected to exercise corporate powers and manage the company's business and properties solely in the interest of the company.

It is in the sense of the fiduciary relationship between directors, as trustees, and the company, as beneficiary, that common law imposes fiduciary duties on directors. For instance, in the exercise of corporate powers and management of the company's business it is required that directors must display loyalty, avoid conflict of interest and secret or personal profit, and not act for collateral purpose other than that of the company[1]. The common law rules and principles on the concept of separate legal personality of a company, the necessity of the company's reliance on natural persons for its corporate existence, the trustee status of directors, and the fiduciary duties of directors have received statutory enactment in common law jurisdictions such as Nigeria and the United Kingdom.

For example, the Nigerian Companies Act 2020 provides that upon incorporation the company shall be a body corporate capable of exercising all the powers and performing all functions of an incorporated company[2]. It also provides that every company shall, for the furtherance of its business or objects, have all the powers of a natural person of full capacity[3], and that the company shall act through its members in general meeting or its board of directors or through officers or agents[4]. Under the Companies Act, directors are declared as trustees of the company's powers, money and properties, and as such shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own or sectional interests[5].

Furthermore, it is provided in the Companies Act that a director of a company stands in a fiduciary relationship towards the company and shall observe utmost good faith towards the company in any transaction with it or on its behalf[6]. Similar statutory provisions on directors' fiduciary relationship with the company and the duties that flow from the relationship are contained in the United Kingdom Companies Act 2006[7]. These statutory provisions are expressly derived from common law rules and equitable principles as they apply to directors and their fiduciary duties to the company. The equitable principles of common law, which have been re-stated in the statutes, require directors, as fiduciaries, to be absolutely loyal and to render faithful service in the interests of the company when exercising corporate powers.

The fiduciary duties of directors are now fairly recognised in case law and statutory provisions however, it is not self-evident why directors are thrust into a fiduciary relationship and the reason they owe fiduciary duties to the company. This article seeks to establish a functional basis for understanding the fiduciary concept and the duties that flow from relationships that answer to the definition or description of a fiduciary. In particular, this article probes a juridical justification for fiduciary duties of company directors; it provides an understanding of the scope and function of directors' fiduciary duties, and mostly importantly, the underlying purpose of the duties.

2. Directors as Trustees

In a broad sense, a trustee is any person or entity acting on behalf and in the interest of another, the beneficiary, for a specified or discretionary objective; whether the trustee exercises power or discretion on behalf of the beneficiary, it must be in the overall interest of the beneficiary. From the earliest time in the evolution of common law principles of company law and practice, directors of a company have been considered as trustees of the company. English case law from about the seventeenth century held directors as trustees of joint stock companies that were established by deeds of settlement, unlike the modern process of incorporation[8]. The deeds of settlement declared directors as trustees of the powers and properties of the company, and it was on the basis of the trust that the courts held directors to account[9]. According to Lindley LJ in In *Re Lands Allotment Co*[10]*;*

> Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees.

Thus, the concept of directors as trustees had its origin in the fact that, in the earliest companies, directors had been categorized as trustees ''in the full technical sense''[11]. As trustees, directors owe a duty to the company

[1] See the precedent and authoritative cases of *Bray v Ford* [1896] AC 44; *Boardman v Phipps* [1966] UKHL 2 *Chan v Zacharia* [1984] HCA 36; *Bristol and West Building Society v Mothew* [1996] EWCA Civ 533
[2] Section 42
[3] Section 43(1)
[4] Section 87(1)
[5] See section 309(1)
[6] Section 305(1)
[7] See Chapter 10 generally of the of the UK Companies Act 2006
[8] See the foundational cases of *Walley v Walley* (1687), 1 Vern 484, 23 ER 609 (Ch) and *Keech v Sandford* [1726] EWHC J76
[9] See the cases of *Charitable Corporation v Sutton* (1742) 26 ER 642; *Re Lands Allotment Co* [1894] 1 Ch 616
[10] [1894] 1 Ch 616
[11] Sealy, L. (1967). The Director as Trustee. The Cambridge Law Journal, 25(1), 83-103. Retrieved May 21, 2021, from http://www.jstor.org/stable/4505134

to use corporate powers, as stipulated in the company's memorandum and articles of association, in the best interests of the company. Directors therefore occupy office of trust and must exercise the powers of the office *bona fide* and for the overall benefit of the company. This applies when directors exercise power to utilise the funds of the company, enter into contracts or execute projects on behalf of the company. In these and other instances of exercise of corporate powers, directors are expected to show loyalty and act selflessly in the sole interest of the company.

The duties a trustee owes to a beneficiary and the legal consequences for any breach of the duties are rooted in equity. It is in human nature that where one party exercises power over another party's interests based on trust, the latter may become vulnerable to the use, misuse, or abuse of such power. The equitable principle of trust ensures that the trusting and vulnerable party is not exploited, and the trusted party with the delegated power acts with loyalty and in good faith. The foundational case of *Keech v Sandford*[1] espoused the fiduciary duties of a trustee to a beneficiary; that a trustee must act with loyalty and without secret or personal profit, or any conflicts of interests but for the overall benefit of the beneficiary.

Through the centuries the authority of *Keech v Sandford* has had strong influence beyond the duties of trustees, into the duties of directors as trustees and fiduciaries of the company. As Mummery LJ held in the case of *Towers v Premier Waste Management Ltd*[2];

> In accordance with equitable principles the special relationship with the company generated fiduciary duties on the part of a director. His fiduciary commitments to the company took the form of a duty of loyalty and a duty to avoid a conflict between his personal interests and his duty to the company.

Similarly, Dillon LJ held in the case of *Multinational Gas and Petrochemical Co Ltd v Multinational Gas and Petrochemical Services Ltd*[3] that ''directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company''. Contemporary statutes on company law and practice have adopted the common law recognition of directors as trustees of the company who owe fiduciary duties to the company. Under the heading, ''Legal position of directors'', the Nigerian Companies Act expressly states that[4];

> Directors are trustees of the company's money, properties and their powers and as such shall account for all the money over which they exercise control, refund any money improperly paid away, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own or sectional interests''.

In light of the duties in the above provision which directors are required to perform as trustees of the company, the Companies Act therefore declares directors as standing in a fiduciary relationship with the company, and as such must observe utmost good faith towards the company in any transaction with it or on its behalf[5]. As discussed in subsequent parts of this article, in both the UK and the Nigerian Companies Acts, the fiduciary duties of directors are expressly stated, and directors are liable for breach of the duties. A point to be noted from the foregoing is that the categorization of directors as trustees of the company, *ipso facto*, make directors fiduciaries of the company, the same way trustees are fiduciaries of their beneficiaries.

3. Fiduciary Concept

Since the development of common law principles of trust, many relationships have been qualified as fiduciary, with attendant obligations that are considered as fiduciary duties. Such relationships include those between a lawyer and client; doctor and patient; parent and child; guardian and ward; bank and customer. Like in the case of a director and the company, each of these relationships is characterised as one between a trustee and a beneficiary, and therefore subject to the fiduciary concept. The case of *Keech v Sandford*[6] is mostly cited as founding the fiduciary concept under common law of trust. But there is the earlier case of *Walley v Walley*[7], which have similar facts with *Keech v Sandford* in that it involved personal benefit derived by a trustee from a lease devised to the trustee for the benefit of an infant beneficiary.

Therefore, it is more appropriate to credit the common law origin of the fiduciary concept to *Walley v Walley* and *Keech v Sandford* as both cases effectively laid out the features of a fiduciary relationship, and the obligations or fiduciary duties which trustees owe to their beneficiaries[8]. Through the centuries these precedent cases have been adopted and applied in the determination of breach of fiduciary duties arising from different

[1] [1726] EWHC J76
[2] [2011] EWCA Civ 923
[3] [1983] Ch 258
[4] Section 309(1)
[5] See section 305(1)
[6] [1726] EWHC J76
[7] (1687), 1 Vern 484, 23 ER 609 (Ch)
[8] For a detail discussion of both cases from a historical perspective on the development of the fiduciary concept, see Leonard I Rotman, Fiduciary Law (Toronto: Thomson Carswell, 2005) at 58–61, 220

circumstances where fiduciary relationships are held to exist. In spite of its long history[1], coupled with its contemporary applicability to a host of sundry relationships, the fiduciary concept has however not been easily or clearly defined and understood. This is evident from a plethora of academic discourse and judicial opinions on the concept across common law jurisdictions.

According to Rotman, ‘‘the commonplace discussion and implementation of fiduciary principles within those jurisdictions conceal the lingering uncertainty surrounding the fiduciary concept’’, describing it as ‘‘fiduciary paradox’’[2]. In the case of *Lac Minerals Ltd v International Corona Resources Ltd*[3] the Canadian Supreme Court notes that ‘‘there are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship’’[4]. Birks describes the fiduciary concept as ‘‘a blot on our law, and a taxonomic nightmare’’[5]. Finn bemoans the definitional uncertainty of the fiduciary concept and fears that; ‘‘There is the obvious hazard of ‘‘fiduciary’’ becoming either a chameleon or an ‘‘accordion term’’[6]. And in the opinion of DeMott, the fiduciary concept is ‘‘one of the most elusive concepts in Anglo-American law’’[7].

However, what may be extrapolated from the case law and academic literature is the type of relationships which is captured by the concept, its guiding principles, the obligations which it imposes, the objectives and reasons for the concept. An understanding of the reasons for the concept and the objectives which its application is meant to achieve would serve more useful purpose than any fortuitous attempts at an absolute definition. But at a general level, a fiduciary is a person who holds a legal or ethical relationship of trust with another person. Thus, in a fiduciary relationship, one person, in a position of vulnerability, justifiably vests confidence, good faith, reliance, and trust in another whose assistance, service, advice, or protection is sought in some matter[8].

This conceptual essence of a fiduciary is well captured by Lord Millett in the case of *Bristol and West Building Society v Mothew*[9] thus; ‘‘A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence’’. In such a one-sided relationship, equity requires the fiduciary to act at all times for the exclusive benefit of the beneficiary. In its essential respect, therefore, the fiduciary concept seeks to ensure that a person who is authorized to act on behalf of another person refrains from serving personal or third party’s interests other than the best interest of the beneficiary.

Accordingly, a fiduciary relationship imposes the obligation of loyalty, no conflict of interests and no secret or personal benefit on the party acting on behalf of a beneficiary. While these obligations are imposed on a party in a fiduciary standing, the beneficiary is conferred with the right to expect that the fiduciary would act honestly, selflessly and in good faith in the exercise of authority or discretion on behalf of the beneficiary. From the application of the fiduciary concept under common law, it basically imposes those duties aimed at protecting vulnerable beneficiaries from exploitation by their fiduciaries. The fiduciary concept may therefore be understood more in its application than in a conceptual definition.

3.1 Common Law Fiduciary Duties

The fiduciary concept lacks definitional clarity and certainty but at common law there is a consensus on the salient features which give rise to fiduciary relationships, and the attendant fiduciary duties. Typically, fiduciary duties are implied in relationships of trust, confidence, power, discretion and vulnerability. At the core of fiduciary relationships lies the duty of loyalty which demands that those in a position of trust and confidence, and exercising power and discretion on behalf of the vulnerable party must act faithfully. The duty of loyalty is thus ‘‘the irreducible core of the fiduciary obligation’’, and it arises out of a concern that the fiduciary will take advantage of the beneficiary”[10]. In the case of *Bristol and West Building Society v Mothew*[11], Millett LJ noted that;

> ‘‘The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his beneficiary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict.

Accordingly, the fiduciary duty of loyalty compels an understanding or expectation in a reasonable person

[1] It has been noted that the fiduciary concept’s civil law origins are even older, dating back to principles of Roman law, while its foundational principles may be discovered in both ancient Greek thought and in the Old Testament. See Leonard I Rotman, (2017). Understanding Fiduciary Duties and Relationship Fiduciarity, 62:4 McGill LJ 975

[2] see Leonard I Rotman, Fiduciary Law, op.cit at p. 52

[3] [1989] 2 SCR 574, per La Forest J at 643-44

[4] supra note 10 at 643–44

[5] Peter Birks, (1996). “Equity in the Modern Law: An Exercise in Taxonomy”. 26:1 UWA L Rev 1 at 18

[6] PD Finn, (1989). “The Fiduciary Principle” in TG Youdan, ed, Equity, Fiduciaries and Trusts (Toronto: Carswell, 1989) at p. 1

[7] A DeMott, “Beyond Metaphor: An Analysis of Fiduciary Obligation” [1988] 5 Duke LJ 879 at p. 879

[8] See the Australian case of *Breen v Williams* [1996] (1996) 186 CLR 71

[9] [1996] EWCA Civ 533

[10] EJ Weinrib, (1975). The Fiduciary Obligation. 25 UTLJ 1

[11] [1996] EWCA Civ 533

that he is to behave in a particular way such as not to put himself in a position of conflict, or make an unauthorized profit, but to act in good faith and in the best interests of the beneficiary[1]. In effect, the duty of loyalty prohibits fiduciaries from acting under conflicts of interest, and this prohibition is generally expressed in the form of two rules: the conflict of interest rule and the conflict of duty rule. On the one hand, the conflict of interest rule prohibits the fiduciary from allowing actual or potential personal interests to conflict with the interests of the beneficiary. That is, the rule prohibits disloyal conduct grounded in the self-interest of the fiduciary.

The conflict of duty rule, on the other hand, prohibits the fiduciary from acting under conflicting mandates; a prohibition of disloyal conduct rooted in conflicting duties to separate third parties, even if the fiduciary's self-interest is not in play. The conflict of duty rule thus prevents disloyal conduct based on inconsistent allegiances of the fiduciary[2]. As was held by Lord Herschell in the case of *Bray v Ford*[3], ''human nature being what it is, there is a danger of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those to whom he was bound to protect''.

The duty to act with loyalty and without conflict of interest is generally understood as an obligation not to profit from the fiduciary relationship. According to Birks; ''The obligation to act disinterestedly is often put as an obligation not to profit from the trust. When we ask which profits are interdicted, in nearly every case the answer is given by the rule against conflicts of interest[4]. Thus, while the duty of loyalty implies the rule against conflict of interest and the rule against personal profit by the fiduciary, both rules may also converge in the duty of loyalty.

However, Conaglen notes that two equitable principles are peculiar to fiduciaries: first, the principle that prohibits a fiduciary from acting in a situation in which there is a conflict between the duty that he owes to his beneficiary and his personal interest; and secondly, the principle that prohibits a fiduciary from receiving any unauthorized profit as a result of the fiduciary position[5]. These two principles are widely recognised as being of universal application to fiduciaries, and they constitute the hallmark of a fiduciary relationship that the fiduciary should act in the exclusive interest of the beneficiary. These ''no-conflict'' and ''no-profit'' rules or equitable principles which express the common law policy aimed at preventing fiduciaries from being tempted to act with self-interest at the expense of the beneficiaries reflect the case law.

In one of the early cases, *Aberdeen Railway Co v Blaikie Brothers*[6], it was held that ''no one, having fiduciary duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect''. In the case, the respondents had contracted to produce goods for the appellants and they sued to enforce the contract. The appellants argued that they were not bound because at the time of the contract Mr Blaikie, the appellants' chairman of board of directors, was also the managing director of the respondents. The court held that the contract was not enforceable for breach of the fiduciary duty of no conflict of interest.

In the case Lord Cranworth LC adopted the earlier authorities of *Keech v Sandford*[7] and *Whelpdale v Cookson*[8] and stated to the effect that Mr Blaikie was conflicted because he could not, with loyalty, obtain the lowest price for the appellants as his ''personal interest would lead him in an entirely opposite direction''. In *Whelpdale v Cookson* decided two decades after the foundational case of *Keech v Sandford*, a trustee had purchased land that belonged to the trust. Lord Hardwicke held that the purchase would not stand because a trustee must not derive personal advantage and benefit from a trust property. The reason that can be gleaned from the judgments in the line of cases is that a fiduciary's lack of loyalty in acting on behalf of the beneficiary invariably results to the breach of the fiduciary duties of no conflict of interest and no personal profit.

The case of *Boardman v Phipps*[9] shows that where there is a breach of the fiduciary duty of no conflict of interest, any personal profit derived by the beneficiary must be disgorged. The case also shows that in the absence of loyalty the use or misuse of power and discretion by a fiduciary can breach both fiduciary duties of no conflict of interest and no self-profit. In the case a solicitor to a family trust, together with one of the trustees, acquired a majority shares in the company which held the trust assets. They thereafter speculated with the company's capital and netted in huge profits. Lord Cohen held that the solicitor must account for the profits because he acted without loyalty to the trust, took personal advantage of his fiduciary relationship, hence he acted in breach of the fiduciary duties of no conflict interest and no self-profit.

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[1] James Edelman, "When Do Fiduciary Duties Arise?" (2010) 126:2 Law Q Rev 302
[2] See the US *Birnbaum v Birnbaum* 539 NE (2d) 574, 541 NYS (2d) 746, (1989); See also Paul B. Miller, (2013). Justifying Fiduciary Duties. 58:4 McGill LJ 969
[3] [1896] AC 44 at 51, 12 TLR 119
[4] (Birks, "Content of Obligation", supra note 15 at 10).
[5] Matthew Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties (Oxford: Hart, 2010) at p. 39
[6] (1854) 1 Paterson 394
[7] [1726] EWHC J76
[8] (1747) 27 ER 856
[9] [1966] UKHL 2

The abuse of fiduciary relationship by directors when they appropriate a corporate opportunity has also been held to be a violation of the duty of loyalty to the company and breach of the duties of no conflict of interest and no self-profit. The authorities indicate that in circumstances of breach of fiduciary duties, the court would invoke its equitable jurisdiction to hold the fiduciary to full account. In the case of *Regal (Hastings) Ltd v Gulliver*[1] Lord Russell made the following point;

> The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*; or upon questions or considerations as whether the property would or should otherwise have gone to the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made.

Lord Russell's succinct point strengthens preceding authorities that in a fiduciary relationship the fiduciary must act with loyalty, without personal profit and in the exclusive interest of the beneficiary. Therefore, fiduciary duties are anchored on the footing that the potential for fiduciaries' selfish interest at the expense of their beneficiaries is so great that it must be prohibited regardless of fiduciaries' good faith, lack of bad faith, or other reasons that might serve to excuse the behaviour in question[2]. In the case of *Pepper v Litton*[3] Justice Douglas of the US Supreme Court held that directors cannot serve themselves first and their companies second; they cannot by the intervention of a corporate entity violate the ancient precept against serving two masters.

According to the Justice, directors cannot utilize inside information and their strategic position in their own interest, and they cannot use their powers and discretion for their personal advantage and to the detriment of the company, shareholders and creditors. Directorial power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the directors to the exclusion or detriment of the company. Where there is a violation of fiduciary duties by directors exercising corporate powers on behalf of the company, equity will undo the wrong or intervene to prevent its consummation[4]. Fiduciary duties of directors as developed and applied under common law through the centuries have been re-stated in modern company law statutes.

3.2 Statutory Fiduciary Duties

Fiduciary concept originated from common law equitable principles of trusts, and derived from a profound knowledge of human characteristics and motives for opportunistic self-enrichment. Hence, the fiduciary duties of no conflict of interest and no self-profit demand from directors the most scrupulous exercise of their powers and discretion not only to protect the interest of the company committed to their charge, but also to refrain from doing anything that would work injury to the company, or to deprive it of profit or advantage[5]. Statutory restatements of these principles are exemplified by the UK Companies Act 2006 and the Nigerian Companies Act 2020.

The statutory provisions cover the scope of common law fiduciary duties but with clarification and simplification for the purpose of correcting the defects in the common law principles, particularly in important areas where the common law position no longer corresponds to accepted norms of modern business practice[6]. The statutory provisions therefore make the law on fiduciary duties more predictable and in tune with commercial development. For example, the statutes expressly declare that directors stand in a fiduciary relationship towards the company and shall observe utmost good faith in any transaction on behalf of the company[7].

However, the statutory provisions include meaningful disclosure by directors where the exercise of their powers and discretion on behalf of the company would breach their fiduciary duties[8]. Although, in some cases such as *Furs Ltd v Tomkies*[9], disclosure was identified as capable of avoiding breach of fiduciary duty, there was however no clear guiding principle for the exception under common law. But generally, under the statutory provisions directors are required to act at all times in what they believe to be the best interests of the company so

[1] [1942] UKHL 1
[2] Paul B. Miller, (2013). Justifying Fiduciary Duties. 58:4 McGill LJ 969; Leonard I Rotman, (2017). Understanding Fiduciary Duties and Relationship Fiduciarity, 62:4 McGill LJ 975
[3] (1939) 308 US 295 at 311
[4] Per Justice Douglas in *Pepper v Litton* (supra)
[5] See the judgment of Justice Layton of the Delaware Supreme Court in *Guth v Loft Inc* (1939) 5 A.2d 503, 23 Del. Ch. 255
[6] With respect to the UK Companies Act 2006 see the Law Commissions Consultation Paper No 153, para 1.7. In every material particular, the provisions of the Nigerian Companies Act 2020 on fiduciary duties are a replication of the UK Companies Act, as such the relevant English case law applies in Nigeria with equal authority.
[7] See section 305(1) of the Nigerian Companies Act
[8] See sections 175(3) of the UK Companies Act, and section 306(6) of the Nigerian Companies Act; Although, in some cases such as the Australian case of *Furs Ltd v Tomkies* [1936] HCA 3, 54 CLR 583, disclosure was identified as capable of avoiding breach of fiduciary duty of no conflict of interest, there was however no clear guiding principle for the exception under common law.
[9] [1936] HCA 3, 54 CLR 583

as to preserve its assets, further its business, and promote the purposes for which it was formed, and they must not exercise their powers for any collateral purpose[1]. The statutes provide that directors own a duty to avoid conflicts of interest, duty not to make secret profit, and duty to declare an interest in proposed or existing transaction or arrangement[2].

The common law bifurcation between conflict of interest and conflict of duties has been simplified under a provision which states that ''any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties''[3]. This is significant because it clarifies the confusion generated by the judgment of Chitty J in the case of London and *Mashonaland Co Ltd v New Mashonaland Exploration Co Ltd*[4] which approved ''double employment'' of a director[5]. The case was considered as authority for the proposition that a director is not placed in breach of fiduciary duties by acting as director for two competing companies[6]. But in the case of *Bristol and West Building Society v Mothew*[7] Millett LJ held that such ''double employment'' falls within the fiduciary duty of no conflicts of interests[8].

Pursuant to the statutory provisions, directors are therefore held accountable to the company for any conflicts of interest and self-profit or benefit from self-dealing made by them in the course of management of affairs of the company, or in the utilisation of the company's property[9]. The prohibitions against conflicts of interest, self-profit and self-dealing represent the necessary implication of the fiduciary duty of loyalty as espoused under common law. The statutes affirmed the position of directors as trustees within the meaning of equitable principles of trusts, and are therefore obligated to act with loyalty and without conflicts of interest and personal profit at the expense of the company. The statutory affirmation of common law equitable principles grounding fiduciary duties has received judicial acknowledgement in cases decided on the statutory provisions.

In the case of *Towers v Premier Waste Management Ltd*[10], Mummery LJ stated that; ''The codified duties are expressly derived from common law rules and equitable principles as they apply to directors''[11], and that the statutory provisions ''extract and express the essence of the rules and principles which they have replaced''. Mummery LJ sums up the equitable principles underlying the statutory provisions on directors' fiduciary duties thus;

> A director of a company is appointed to direct its affairs. In doing so it is his duty to use his position in the company to promote its success and to protect its interests. In accordance with equitable principles the special relationship with the company generated fiduciary duties on the part of a director. His fiduciary commitments to the company took the form of a duty of loyalty and a duty to avoid a conflict between his personal interests and his duty to the company.

Jackson LJ even noted in the case of Sharma v Sharma[12] that there is no material difference between the statutory fiduciary duties and ''the pre-existing fiduciary duties imposed by equity''. However, the statutory fiduciary duties are more clear-cut and unambiguous than the common law equitable principles from which they were derived. Significantly, the statutory provisions pruned the case law on fiduciary duties to the extent that the duty of conflicts of interest does not stifle entrepreneurial and business activities by directors. Also, that the statutory provisions should only prevent directorial exercise of corporate powers in conflict transactions and business opportunities where there is a clear case for doing so[13].

Thus, the statutes provide that conflicts of interest may be authorised by the board of directors or members in general meeting if the company constitution does not provide to the contrary[14]. Directors are required to disclose any personal interests in a proposed transaction, and before any secret profits are made from such transactions. The board or general meeting may or may not authorise any resulting profits from the transaction[15].

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[1] See section 305(3)(5) of the Nigerian Companies Act
[2] See sections 175-182 of the UK Companies Act, and section 306(1), (2) of the Nigerian Companies Act
[3] Section 175(7) of the UK Companies Act
[4] [1891] WN 165
[5] For in-depth analysis of this case, see Dominique Lemiere, (2017). *London & New Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd*: Is It Authority that Directors Can Compete with The Company? University of Western Australia Law Review Vol 42: 98
[6] See *Bell v Lever Brothers Ltd* [1931] UKHL 2 (with respect to a director acting in double capacities for two companies). *Cf* the case of *In Plus Group Ltd v Pyke In Plus Group Ltd v Pyke* [2002] EWCA Civ 370
[7] [1996] EWCA Civ 533
[8] See the case of *In Plus Group Ltd v Pyke In Plus Group Ltd v Pyke* [2002] EWCA Civ 370, where Sedley LJ questioned whether Mashonaland Co Ltd v New Mashonaland Exploration Co Ltd could still be regarded as good law. See also Lowry, JP, (2018). Company Law (10th edition ed.) OUP, chapter 14, pp. 63-65
[9] Section 305(2), (3) of the Nigerian Companies Act
[10] [2011] EWCA Civ 923
[11] See also the judgment of Norris J in the case of *Breitenfeld UK Ltd v Harrison & Ors* [2015] EWHC 399
[12] [2013] EWCA Civ 1287
[13] See the Law Commissions Consultation Paper No 153, at para 3.26
[14] See section 175(5)(a) of the UK Companies Act
[15] Pursuant to articles 14(1), 13(3) and 16(1) of the UK Model Articles 2008, affected directors are prohibited from participating in the decision-making process for the purpose of quorum or voting to authorise such conflict of interest transaction.

But fiduciary duties will be breached if the disclosure is made after the secret profits, and in such case the directors concerned shall account for the profits[1].

In effect, the statutes permit directors to have interests in conflict transactions provided they make full disclosure and receive informed consent or approval from the board of directors or members in general meeting. Therefore, to the extent of business and commercial exigencies, there is a conditional statutory exception to directors' fiduciary duties. Otherwise, directors' fiduciary duties are justifiably immutable.

4. Justification for Fiduciary Duties

It is uncertain why fiduciary relationships attract fiduciary duties. The case law indicates that courts uphold fiduciaries to a high moral or ethical standard. This moral theme forms an essential part of the fiduciary concept. As Miller noted, the moral value of interpersonal trust is critical to human flourishing toward achievement of socially desirable ends, and that the ''the justification for fiduciary duties is attributed to the moral value of trust''[2]. The body of literature justifies the imposition of fiduciary duties on two grounds: first is ethical – fiduciary exercise of power for self-interested reasons is wrong; second is practical – fiduciary duties facilitates productive relationships, whether of trust or of agency[3]. The fiduciary concept was developed from the equitable principles of trusts under which; ''A trustee is held to something stricter than the morals of the market place''[4].

Thus, fiduciary relationship has trust at its core, hence if there is a breach of fiduciary duties equity is concerned, not just to remedy the breach, but to enforce the trust obligation. The justification for fiduciary duties implicates the traditional principle of trusts. People trust others to act on their behalf or to perform tasks on their behalf, but the mischief that can occur in such circumstances is that the trusted party may divert the benefit away from the trusting party or beneficiary so that the trust is abused. Public morality is offended by such conduct. The court of equity, asserting this public morality or policy, attaches liability to deter such abuse[5]. Context for the deterrence of abuse of trust is understood from the features of a fiduciary relationship.

There is the exercise of power or discretion by the fiduciary on behalf of the beneficiary; the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and the beneficiary is peculiarly vulnerable and at the mercy of the fiduciary[6]. In these circumstances, equity requires dependable loyalty that is founded upon considerations of moral and public policy in order to protect and reinforce the integrity of social behaviour, institutions and enterprises. Therefore, fiduciary duties are demonstrably upheld by the courts to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society; and also, to protect both personal and economic interests which are valuable in society[7].

Thus, fiduciary duties are justified on the basis that it fosters trust and dependability in social and business relationships, hence economic efficiency through the preservation or allocation of productive capacities along the lines of investments and expertise. For instance, those with capital or owners of companies but without requisite business skill or knowledge can safely rely on experts such as directors and business managers. These are important aspects of social and economic interactions of high trust and confidence, with implicit dependency and peculiar vulnerability of beneficiaries to their fiduciaries[8]. The preservation and protection of the integrity of socially and economically valuable and necessary relationships which arise from human interdependency is the underlying policy of fiduciary duties.

The socio-economic policy which underpins fiduciary duties accounts for the strict application and liability in almost all cases of breach. Liability is almost always inveterate and uncompromising, as it does not rest upon the narrow ground of injury or damage but upon a broader foundation of a practical public policy. This is for the purpose of removing all temptation, extinguishing all possibility of profit that may flow from a breach of fiduciary duties[9]. Though the prohibition against breach of fiduciary duties may be excused upon full disclosure by fiduciaries, and informed consent by beneficiaries, the prophylactic nature of the duties is by no means impaired. Liability is triggered without enquiry into the circumstances surrounding the breach of fiduciary duties. In the compelling words of Rich J in the case of *Furs Ltd v Tomkies*[10];

> It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary

[1] See section 306(6) of the Nigerian Companies Act, and generally, sections 175(4)(b), (5) and (6) and 180 of the UK Companies Act

[2] Paul B. Miller, (2013). Justifying Fiduciary Duties. 58:4 McGill LJ 969; According to the author; ''Loyalty, fidelity, faith, and honor form its (fiduciary concept) basic vocabulary''.

[3] William W Bratton, (1993). Self-Regulation, Normative Choice, and the Structure of Corporate Fiduciary Law. 61:4 Geo Wash L Rev 1084 at 1101.

[4] Per Justice Cardozo in the case of *Meinhard v Salmon* (1928) 249 NY. 458, 164

[5] Robert Flannigan, (1990). Fiduciary Obligation in the Supreme Court. 54:1 Sask L Rev 45 at 46.

[6] See the dissenting opinion of Justice Wilson of the Supreme Court of Canada in the case of *Frame v Smith* ([1987] 2 SCR 99 at 136

[7] PD Finn, Fiduciary Obligations (Sydney: Law Book Company Limited, 1977) at p. 1

[8] Leonard I Rotman, (1996). Fiduciary Doctrine: A Concept in Need of Understanding. 34:4 Alta L Rev 821

[9] See the opinion of Justice Layton in the case of *Guth v Loft Incorporated* (1939) 5 A (2d) 503 at 510

[10] [1936] HCA 3, 54 CLR 583

> capacity with the affairs of the company. If, when it is his duty to safeguard and further the interests of the company, he uses the occasion as a means of profit to himself, he raises an opposition between the duty he has undertaken and his own self-interest, beyond which it is neither wise nor practicable for the law to look for a criterion of liability. The consequences of such a conflict are not discoverable. Both justice and policy are against their investigation.

It therefore does not matter whether the company suffers loss, and so no consideration is given by the courts to whether the director was acting in good faith. This absolutist attachment of liability is considered to be the minimum necessary to provide an effective deterrent and ensure the highest degree of loyalty[1]. According to Davies J in the case of *Hoffman Steam Coal Company v Cumberland Coal & Iron Company*[2];

> Remembering the weakness of humanity, its liability to be seduced, by self-interest, from the straight line of duty, the sages of the law inculcate and enjoin, a strict observance of the divine precept: 'Lead us not into temptation'.

The underlying objective is to deter or prevent the occurrence of a breach, and not to remedy it. Thus, it is immaterial, both under common law[3] and statutes[4], whether the company failed, or was unable or not ready to take advantage of the contract, property, business information or opportunity which has been diverted away from it by the directors. Liability for breach of fiduciary duties will arise once directors, entrusted with power and discretion to be exercised in the interest of the company, indulge in actual or potential act that is not for the overall benefit of the company. There is no permissible rationalization for any act that falls short of serving the interest of the company. The assurance of liability for any breach or attempt to breach aligns with the policy of protecting important social and economic relationships which justify fiduciary duties.

5. Conclusion

The centuries old authorities of *Wally v Wally* and *Keech v Sandford* established fiduciary duties arising from fiduciary relationships in the context of the equitable principles of trusts. The implication of the authorities was extended to the relationship between a company and its directors. Thus, directors are recognized as trustees of their company, with the effect that they stand in a fiduciary relationship with the company and, *ipso facto*, owed to the company the fiduciary duties of no conflict of interest and no self-profit.

Liability for breach of fiduciary duties hardly admits of any exception, and will attach to directors where they act for any purpose other than the exclusive interest of the company. The duties have been restated in statutes of common law jurisdictions such as Nigeria and the United Kingdom. The prophylactic nature of the duties has also survived the statutory restatement. It is the need of a public policy to protect important social and economic relationships both at individual and corporate or institutional levels that has justified fiduciary duties since about the seventeenth century.

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[1] Lowry, JP, (2018). Company Law (10th edition ed.) OUP, chapter 14, at p. 50

[2] (1860) 16 Md 456 at 507, at p. 507

[3] See the instructive case of *Hastings) Ltd v Gulliver* [1942] UKHL 1; In this case the directors had acted bona fide throughout the process of the transaction, had used their own money, and had not denied the company of the business opportunity, including the fact that the company was not even financially capable of purchasing the shares, and did not suffer any actual loss. But Lord Russell held that liability arises from the mere fact of a profit having been made in a conflicting transaction.

[4] See section 175(2) of the UK Companies Act 2006 which provides that liability for breach of fiduciary duties will apply in particular to the exploitation of any property, information or opportunity belonging to the company, and it is immaterial whether the company could take advantage of the property, information or opportunity.