Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) DOI: 10.7176/JLPG
Vol.83, 2019

'Insider Trading Regulation': A Shift from the Common Law Perspective

Omowunmi Adedurotimi
Partner, PAC Solicitors
16, Kofo Abayomi Street, Victoria Island, Lagos, Nigeria

Abstract
The shortcomings of the Common law to effectively manage the challenges of insider trading will be discussed in this paper as a basis for statutory intervention in the development of insider trading regulations.
Keywords: Company, insider, insider trading, information, legislation, disclosure and fiduciary duty.
DOI: 10.7176/JLPG/83-07
Publication date:March 31st 2019

1.0 INTRODUCTION

Insider trading[1] may be defined as the act of trading in company securities by persons often referred to as insiders who by virtue of their relationship with the company, possess some information, not available to the public, but material to the securities concerned. For instance, insider trading occurs where a director knows that a company is in a bad financial state and sells his shares in it knowing that in a few days, a cut in the dividend payment will be made public. Likewise, the director will be an insider trader if on being informed before it was generally made public that the company has discovered oil on its own land, he buys more shares in the company with the hope of an increase in their market value as soon as the information is made public.[2]

The general perception is that the common law did not deal adequately with insider trading, hence paving way for judicial interpretation to fill the void.[3] For instance, in Goodwin vs. Agassiz,[4] the court held that in a faceless market, insiders had no duty to refrain from trading in their corporation's stock when armed with material information.[5]

However, the courts[6] were willing to recognize a cause of action where the director traded with the plaintiff plaintiff directly or through an agent as opposed to dealing through a faceless market.[7]

This paper will first provide an overview of insider trading, what constitutes unpublished price sensitive information and the effects of the common law fiduciary duty of disclosure on insider trading. Secondly, it will examine the role of the common law at curbing the activities of insiders and its[8] inadequacies. Finally, it will unveil the historical account of insider trading regulations of different jurisdictions with a review of various statutory interventions on insider trading necessitated by the shortcomings of the common law.

2.0 AN OVERVIEW OF INSIDER TRADING

Insider trading refers to a practice in which an insider or a related party trade based on material non-public, price-sensitive information obtained during the performance of the insider's duties to the corporation, or otherwise in breach of a fiduciary duty or other relationship of trust and confidence or where the non-public information was misappropriated from the company.[9]

2.1 Unpublished Price-Sensitive Information

Unpublished Price Sensitive Information refers to:

> *'information which relates to specific matters relating to or concerned (directly or indirectly) with that Company, that is not of general nature or of concern to the company, and is not generally known to those persons who are accustomed or would be likely to deal in those securities but which would if it were generally known to them be likely materially to affect the price of those securities.'*[10]

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[1] Also referred to in this paper as 'the act of trading on insider information.'
[2] Joseph E. O Abugu: 'Company Securities: Law and Practice -Insider Trading and Capital Market Manipulation' Page 235.
[3] Thomas Lee Hazen: 'Corporate Insider Trading: Reawakening The Common law' Washington and Lee Law Review, Volume 39- Issue 3- Article 4- Summary 6-1-1982 Page 846.
[4] 283 Mass. 358, 186 N. E. 659 (1933).
[5] Thomas Lee Hazen, Page 847.
[6] See Strong vs. Repide, 213 U.S. 419 (1909); Hotchkiss vs. Fisher, 136 Kan. 530, 16 P.2d 531 (1932); Sampson vs. Hunt, 222 Kan. 268, 564 564 P. 2d 489 (1977).
[7] Thomas Lee Hazen, Page 847.
[8] That is, the common law.
[9] Insider Trading U.S. Securities and Exchange Commission. Accessed May 7, 2008.
[10] Section 614 (2) of the Companies and Allied Matters Act 1999: See also Branson D.M, "Insider Trading II; The British Regulation in the light of the American Experience" (1982) The Journal of Business Law, 414-420.

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What constitutes unpublished price sensitive information is vague and elusive as the meaning of what is unpublished or generally unknown cannot be defined with precision.[1] What is essential however is that the information traded upon must be confidential and not available to the public at the time of trade.

Section 58 of the Criminal Justice Act of 1993[2] gave stringent circumstances where information will qualify as being made available to the public. Similar provisions have been adopted in most jurisdictions.[3]

This is a step away from what was attainable prior to the Insider Trading Act[4] where there was uncertainty as to when price sensitive information was made public. Hence, the court became saddled with the responsibility of determining this on a case-by-case basis by applying the reasonable investor's test. Nonetheless, section 58[5] gave a clearer definition of the term 'publication' as it relates to insider trading. However, there remain some uncertainties regarding 'publication.'

For instance, whether publication in any official languages; radio and television; or in a financial journal only sold on subscription will suffice?[6]

2.2 Fiduciary duty of disclosure

The fiduciary duty of disclosure is crucial in the act of trading on inside information.[7]

> 'A fundamental safe guard to the investors and creditors in modern company law is provided by the twin idea of *disclosure and publicity*. This idea permeates the functioning of the company and constitutes an essential requirement for the efficiency of most of the provisions of company legislation.'[8]

This corporate law principle imposes a duty on the fiduciary not to use confidential information for personal gain or profit but to disclose it to his principal. Thus, 'liability is imposed not when the fiduciary gains the confidential information but when without disclosure to his principal he uses the information to purchase or sell securities[9]….'

In the case of *SEC vs. Texas Gulf Sulphur Co,*[10] based on the policy of equality of access to information, the court held that anyone in possession of material non-public information was duty bound to disclose it. Where he is precluded from such disclosure, his only option would be to abstain from trading on the said information otherwise; he may be liable for insider trading. This is known as the disclose-or-abstain rule. It is worthy to note that this rule (disclose-or-abstain rule)[11] is 'also applicable to anyone in possession of inside information *who may not be strictly termed an insider.... '*[12] The implication is that while it has on one hand expanded the category of insiders, it has also imposed the duty of disclosure even where there exists no fiduciary duty to do so.

In *United States vs. O'Hagan,*[13] O'Hagan's conviction was reversed on the ground that he owed no fiduciary duty to the company or its shareholders; hence, he was not liable for insider trading. The Supreme Court however re-instated his conviction and stressed that while he had no duty to the company and its shareholders, he did owe a duty to the source of his information.[14] A duty that requires disclosure and 'his failure to disclose his personal trading to Grand Metropolitan PLC and Dorsey…made his conduct deceptive.'[15] The court in its wisdom expanded the disclosure duty beyond that owed to the principal, the company or the shareholders. According to the court, it extends to the source of the information and simultaneously to the investing public. 'In short, it seems the duty can be owed to virtually anyone with confidential information, so long as the *tip* is then used "in connection with a securities transaction." '[16]

However, the position of the courts have shifted further so that an insider trader will only be liable for breach of duty to disclose only if there is a pre-existing fiduciary duty to that effect.[17] In Dirks vs. SEC,[18]

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[1] Joseph E.O. Abugu; 'The Statutory War on Insider Dealings' The Commercial and Industrial Law Review vol 1 2002 114/115. Published by the Department of Commercial and Industrial Law; Faculty of Law, University of Lagos Nigeria.
[2] Part V.
[3] Section 74 of the Securities Services Act [No. 36 of 2004].
[4] No. 135 of 1998.
[5] Ibid.
[6] Blackman *et al* Op cit *Page* 1 5-394-14.
[7]Luiz 'Prohibition Against Trading on Insider Information-The Saga Continues' (1990) 2 SA *Merc LJ* 328 330; where it was argued that it was more correct to speak of insider trading but of the act of trading on insider information.
[8] Akanki O; Legal and Practical Significant of Disclosure and Publicity of Company Information (1976-78)13-15. Nigerian Bar Journal 13.
[9] *United States vs. O'Hagan* 97 C.D.O.S 4931.
[10] 401 F2d 833 (2nd Cir 1968), cert denied 394 US 976 (1969).
[11] Blackman *et al* Op cit *Page* 1 5-394-2.
[12] Second circuit of the Federal court of Appeals in Sec vs. Texas Gulf Sulphur Co.
[13] 97 C.D.O 4913.
[14] Ignacio E Salceda and Brett Rodda 'Getting the Appropriate Misappropriators: An Analysis of the –Supreme Court's Decision in United States vs. O'Hagan.
[15] Ibid.
[16] Ibid.
[17] *Chiarella vs. United States* 445 US 222(1980)\ Dirks vs. SEC 465 US 646 (1983).
[18] 463 U.S. 646 (1983).

reversing the court of appeal's decision that imposed liability on the investment analyst Raymond Dirks, the court stated that he 'could not be liable for insider trading because the information he received was not as a result of fiduciary breach and therefore, he had no duty to disclose it to the market.'[1]

Similarly, in *Chiarella vs. United States*,[2] the court overturned an employee's rule 10b-5 conviction because the employee had no direct fiduciary relationship with any of the target companies in which he traded. Justice Powell found that Chiarella's conviction could not be upheld because doing so imposed a duty of disclosure among all market participants who had some information that other traders might not have. The rationale behind this dictum could be that ideally, security analysts should be encouraged to make an effort to investigate companies and then communicate their findings to their investors[3] rather than wait to be spoon fed.

Still under the disclosure requirement, it is important to know that by Rule 14 e-3 of SEC,[4] anyone with material non-public information regarding a tender offer has a duty to disclose the information to the market or abstain from trading.[5]

2.3 WHO IS AN INSIDER?

Section 72 of the South African Securities Services Act 36 of 2004[6] defines an insider to mean a person who has inside information-

(a) 'through-

(i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates: or

(ii) having access to such information by virtue of employment, office or profession: or

(b) Where such person knows that the direct or indirect source of the information was a person contemplated in paragraph…'

A company insider is therefore 'someone who has access to important information about the company that affects its stock price or might influence investors' decisions.'[7]

That is, persons who are sufficiently connected with the company that are likely to handle valuable inside information.[8]

These class of persons shall not buy, sell, or otherwise *deal* in the securities of the company (or a related company) which are offered to the public for sale or subscription.[9]

Theoretically and in the actual course of events, a person who is not an insider may be given access to privileged information by some remote connection and thus be liable for insider trading. Such persons are **secondary insiders or tippees.** These are persons who *knowingly (directly or indirectly)* obtain unpublished price sensitive information from persons who are connected with a particular company with the knowledge that the connected person held the information by virtue of his connection with the company. Moreover, it is reasonable to expect the connected person not to disclose the information except for the proper performance of his official functions. These individuals are prohibited not only from dealing in the securities of the company but also in the securities of other companies with which the particular company is related or involved, whether actual or contemplated.[10] They include persons connected to the company officially for example, auditors, accountants, solicitors, brokers, bankers. Also included are public officers to whom the company may divulge price sensitive information under statutory obligation before such information becomes generally available to members of the public.

Various provisions in insider trading legislation however allows for circumstances where certain persons are exempted from liability even when they are in possession of unpublished price sensitive information.[11]

3.0 GENERAL PRINCIPLES OF COMMON LAW

The Company law has no specific provisos dealing with insider trading. Rather, the general principles of common law and equity prevailed. The principles are: (i) the fiduciary duties of loyalty and good faith, and (ii)

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[1] Ibid.
[2] 445 U.S. 222 (1980).
[3] Op cit (footnote 28).
[4] Securities and Exchange Commission.
[5] See more on Rule 14e-3 in Blackman *et al,* 1 5-394-3.
[6] SSA.
[7] F.John Reh: 'Your Guide to Management' {internet sourced}.
[8] (a) J.E.O.Abugu Op cit Page 114. (b) See also Re Cady, Roberts & Co (1961) 40 S.E.C 907. Here, it was held that the insider's obligation rests on "the existence of a relationship giving access, directly or indirectly, to information intended to be available only for corporate purpose and not for the benefit of anyone…" Page 912.
[9] Cf: The EEC Directives and the English Criminal Justice Act, 1993.
[10] See Section 88 of the Investment and Securities Act of 1999 (ISA).
[11] See section 90/91 ISA.

the duties of care and skill[1] that exists between directors and shareholders. This paper will examine the fiduciary duties of loyalty and good faith.

3.1. FIDUCIARY DUTIES

This category of duties may be viewed under four different rules.

The first rule is to the effect that a director must act in good faith in what he believes to be in the interest of the company. He is prevented from gaining any advantage from his position as a director. Therefore, in a sale or purchase of securities on behalf of a company, he is not expected to make secret profits,[2] but rather obtain the best selling price or ensure the most reasonable price for the securities. Therefore, where a fiduciary relationship exists, the director in exercising his powers must act bona fide in the best interest of the company. He may not, either during or after his service with the company, use for his own purpose, anything, including trade secrets and confidential information, entrusted to him for use on behalf of the company, otherwise it becomes an unauthorized use of inside information resulting in a breach of his fiduciary duty to the company.

The second rule is that a director must exercise his powers for proper purposes. In other words, his powers must be exercised for a given purpose, which must be proper.[3] According to Isaacs J:[4]

> '...It must be exercised as all such powers must be, bona fide, that is for the purpose for which it was conferred, not arbitrarily or at the absolute will of the directors, but honestly in the interests of the shareholders as a whole.'[5]

In *Hogg vs. Cramphorn Limited*[6] where directors issued shares in order to set up a trust scheme which would discourage a take-over bid and also ensure their continued control of the company, Buckley J. following *Punt vs. Symons and Company Limited*[7] held that directors are not entitled to use their powers in issuing shares merely for the purpose of maintaining their control of the company or for the purpose of defeating the wishes of the existing majority shareholders. Thus, the directors' good faith was disregarded and held irrelevant in determining the propriety of purpose.[8]

The third rule is that a director must exercise an independent and unfettered discretion.[9] Although issues will often arise for decision in which a director will necessarily have to rely to a large extent on the knowledge and experience of others, he must exercise an independent discretion in the sense that, having listened to what his colleagues have to say, he must always bring his own mind to bear on the issue, using such skill and judgment as he may possess.[10]

Lastly, is the rule that a director must not place himself in a position in which his personal interests or duties conflict with that of the company. He is duty bound to disclose the opportunity he obtains in his capacity as a director to the company and must therefore not use corporate property, opportunity or information for his own advantage. In *Canada Aero Services vs. O'Malley*,[11] a conflict of interest arose where the director of a company converted a project which the company was trying to negotiate, (but which was unlikely to succeed) to a new company formed by him. The court held him liable to account for the profits he had made. Also, in *Industrial Development Consultants vs. Cooley*,[12] Mr. Cooley, an architect and the managing director of *Industrial Development Consultants* (IDC) was asked to conclude a contract on behalf of his company. Rather, he resigned from the company on the ground of poor health in order to divert the contract to himself. The court held him liable and accountable to the company for the profits made.

It is worthy to know that despite the effort of the common law fiduciary duties of loyalty and good faith, it failed to prohibit insider trading.

3.2 INADEQUACIES OF THE COMMON LAW

The first inadequacy of the common law is the restrictive category of an 'insider.' Only directors, officers and persons who have direct relationship with the company are considered insiders. Persons who although have no direct link with the company but are closely connected enough to have or deal on inside information are not considered insiders.[13] This singular fact questions the competence of the common law to curb insider trading

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[1] L. C. B. Gower: Principles of Modern Company Law fifth edition London: Stevens and Sons, Ltd. 1954 at Page 551.
[2] Regal Hastings Limited vs. Gulliver [1967] 2 AC 1347.
[3] Sasegbon Deji: Nigerian Companies and Allied Matters Law and Practice Dsc Publication Limited, Lagos. Printed by Kim Hup Printing Company Pte Limited Singapore, 1991 Page 435.
[4] Metropolitan Life Assurance Company Limited vs. Ure (1923) 33 C. L. R. 199 AT 127.
[5] See also Rich J. in Mills vs. Mills (1938) 60 CLR 150 159.
[6] [1966] 3 All E. R. 420.
[7] [1903] 2 Ch. 506.
[8] Sasegbon Op cit.
[9] See Coronation Syndicate Ltd vs. Lilienfeld and the New Fortuna Co Ltd 1903 TS 489.
[10] Blackman et al Op cit 1 5-394-20.
[11] (1973) 40 DLR (31) 371.
[12] Blackman et al Op cit 1 5-394-20.
[13] That is, the secondary insiders.

ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) DOI: 10.7176/JLPG
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since such category of persons can freely trade on inside information without incurring liability.

Another shortcoming of the common law is the scope of the director's fiduciary duty. That is, whether the director's fiduciary duty is limited to the company as an entity or whether it extends to the shareholders and members of the company? In *Percival vs. Wright,*[1] some directors were negotiating to sell a company's undertaking to outsiders at a higher price per share. The shareholders offered to sell their shares to the directors without being aware of this information at the time. The directors on the other hand accepted the offer and purchased the shares without divulging any information to the shareholders. In an action brought by the shareholders to set aside the sale on the ground that the directors ought to have informed them of the negotiation, Swinfen Eady J held that:

> 'the purchasing directors were under no obligation to disclose to their vendors or shareholders the negotiations which ultimately proved abortive. The contrary view would place the directors in a most invidious position, as they could not buy or sell without disclosing negotiations, a premature disclosure of which might well be against the best interest of the company. I am of the opinion that the directors are not in that position.'

According to him, it cannot be said that the directors dealt unfairly with the shareholders who approached the directors and even named the price they wanted to sell their shares.

Although *Percival vs. Wright* was only a decision of the lower court, it served as precedent mainly because the higher courts have not overruled it. Hence, in *Re chez NICO (Restaurants) Limited,*[2] it was submitted that the directors owe no fiduciary duty to the shareholders and were therefore under no obligation to disclose to them relevant information with respect to the value of their shares. Similarly, 'the majority rule'[3] in the American state courts can be measured parallel to the principle in *Percival vs. Wright* that the directors or officers owe a fiduciary duty only to the corporation and are therefore under no fiduciary duty to disclose inside information to the shareholders of the company.[4]

From the above, it may be implied that generally, fiduciary duties are limited only to the company as a legal entity with its own rights and obligations. These duties do not extend to members of the company or potential shareholders who may also suffer from the insider trading.[5] Consequently, shareholders cannot bring an action against a director who by virtue of his position becomes privy to unpublished price sensitive information and uses the information to his advantage but their own loss.

Nevertheless, it is worthy to note that the decision in *Percival vs. Wright* has been a subject of extensive criticism. In the words of Professor Louis Loss,[6] this decision elevated 'the corporate ghost (*the persona ficta*) over the flesh and blood owners of the company and is a monument to the ability of lawyers to hypnotize themselves with their own creations.' In his opinion, at the commencement of the take-over negotiations, the directors 'became trustees for the sale for the benefit of the company and shareholders, and could not purchase the interest of an ultimate beneficiary without disclosing those negotiations.'

Handley J A[7] was of the view that there are good reasons behind the established rule that in general, a director's fiduciary duties are owed to the company alone. This is because if fiduciary duties owed by directors to their companies were also owned to the shareholders, directors would be subject to harassing actions brought by minority shareholders. Since in that event, each shareholder would have a personal right, and directors would be exposed to a multiplicity of actions. However, *'....this should not preclude the recognition of a fiduciary duty to shareholders in relation to dealings in their shares where this would not compete with any duty owned to the company.'*[8]

The above argument is premised on the fact that there are in '…certain special circumstances where fiduciary duties, carrying with them duty of disclosure, can arise which place directors in a fiduciary capacity vis-à-vis the shareholders.'[9] Hence, '…the fact that the relationship between director and shareholder does not of itself give rise to a fiduciary duty does not prevent such an obligation arising when the circumstances require it.'[10] Rather, 'the duties that arise from such fiduciary relationships depend on the circumstances giving rise

[1] (1902) 2 Ch 421.
[2] [1992] BCLC 192 208.
[3] This is a rule that selects one or two alternative based on which has more than half the votes. It is a binary rule used most often in influential decision-making bodies, including the legislatures of democratic nations.
[4] Blackman et al Op cit 1 5-385. Similar decision was taken in Du Pont vs. Du Pont 242 Feb 98 (1917) at 136.
[5] J.E.O Abugu Op cit Page 240.
[6] The Fiduciary Concepts as Applied to Trading by Corporate Insiders in the United States: 1970 33 MLR 34 40-41. See also Blackman et al Op cit 1 5-383.
[7] In the case of Brunninghausen vs. Glavanics (1999) 32 ACSR 294 301 CA(NSW). See also Glandon Pty Ltd vs. Strata Consolidated Pty Ltd (1993) 11 ACSR 543 CA(NSW); Coleman vs. Myers [1997] 2 NZLR 225 CA(NZ); Neuberger J in Peskin vs. Anderson [2000] 2 BCLC 1 14.
[8] Brunninghausen vs. Glavanics Supra.
[9] Browne Wilkinson in Re chez NICO (Restaurants) Limited [1992) BCLC 192 208. Blackman et al Op cit 1 5-383 -392.
[10] Platt vs. Platt [1992] 2 BCLC 745 755-756. Blackman et al Op cit 1 5-383 -392.

them.'[1]

Thirdly, it has been established that a director who makes use of confidential price sensitive information affecting the securities of a company for his own advantage is in breach of fiduciary duties and therefore liable to account for any profits made.[2] In practice however, it is unlikely that the company would call him unless and until there is a change of control. Also, if one director commits a breach, the other directors may cause the company to take action against him. Nevertheless, most public companies are likely to avoid damaging publicity by persuading the errant director to resign "for personal reasons" and to go quietly.[3] Even where the director is in breach of any fiduciary duty, the penalties for such actions and the relief available to victims of insider trading under the common law is not commensurate with the offence.

The incompetence of the common law and equitable principles to deal with insider trading necessitated the enactment of legislation.[4]

4.0 HISTORICAL ACCOUNT OF INSIDER TRADING REGULATIONS

STATUTORY INTERVENTION ON INSIDER TRADING

The historical account of the legislation began with the United States of America[5] being the first country to put up a strong resistance to insider trading. This was because of the 1929 crash in the stock exchange market. The crash was widely attributed to the activities of corporate insiders. A United States Senate Committee report revealed that several persons in fiduciary positions had acted on inside information.[6] The U.S Congress therefore enacted the Securities and Exchange Act of 1934 (SEA)[7] with the aim of protecting the ordinary purchaser or seller of securities and maintaining a fair and honest market.[8] Hitherto, the different provisions of the SEA have proven to be more potent than the common law particularly section 16(a) and (b).

Hence, the company or any of 'its shareholders' may bring an action in the company's name against any person who trades on inside information thereby making him liable to account for any profit realized from such purchase or sale. This is a great departure from the common law fiduciary duty owed to the company only. By section 16 of the SEA, there is no requirement that the plaintiff has to prove the use of inside information. Although not too many countries have adopted it, this provision has overtime proven to be the most effective under SEC.[9]

The United Kingdom agonized over insider trading for several years but did not legislate against it until 1980.[10] In 1945, the Cohen Committee in England recommended that it was unwise to impose liabilities on directors who dealt with the shares of their company because their position as directors exposes them to information about the company's affairs not available to other players.

By 1962, the Jenkins Committee adopted the Cohen Committee's report and further recommended that a director who is guilty of insider trading should pay compensation to an aggrieved person and be prevented from dealing in options in securities of his company.[11] While the former recommendation was implemented, the latter was not.

However, the Stock Exchange and the City Code on Takeovers and Mergers provide sanctions against insider dealing.[12] The Code is primarily concerned with takeovers and mergers.[13]

Finally, the Company's Act of 1980 regulated insider trading in the United Kingdom but by 1985 the Act was passed moving insider trading provisions to the Company Securities (Insider Dealing) Act of 1985. In 1993, Part v (ss 52-64) of the Criminal Justice Act repealed the Company Securities (Insider Trading) Act. The effect of this legislation[14] on insider dealing was that:

(i) Companies and corporate bodies could not be liable; and
(ii) Only criminal sanctions could be imposed on insider dealing and these sanctions mainly cover dealings made on a regulated market as defined by the Act. This seems to be a shift from the US

[1] Supra.
[2] Industrial Development Consultants vs. Cooley Op cit.
[3] L. C. B. Gower Op cit Page 607-608.
[4] The various Insiders Trading Act enacted by different countries. For example: The South African Financial Services Board Act (Act 97 of 1990); The United States Securities and Exchange Act of 1934; The Nigerian Investment and Securities Act of 1999; The Japanese Financial Markets Abuse Act of 2002 et cetera.
[5] U.S.
[6] Senate Committee Report No 1455, 73rd Congress 2nd Session, 53 [1934].
[7] SEA
[8] Articles in [1975] 32 Washington and Lee LR 571FF.
[9] Loss 'Fiduciary Concept as Applied to Trading by Corporation -Insiders in the United State' (1970) 33 MLR 34 37-40.
[10] L. C. B. Gower Op cit Page 607.
[11] Report of the Committee on Company Law and Amendment 6659 of 1945 para 99(c).
[12] An effort by the Financial Committee of the London City Code to avoid legislative intervention by imposing "Voluntary Self Discipline."
[13] Any person who is privy to any preliminary takeover and merger discussion or to any intention to make an offer is prohibited from inside trading.
[14] That is, the Criminal Justice Act.

regulation and may not adequately curb insider trading.

Regulation of insider trading in South Africa may be traced to the Millin Committee of 1945.[1] The Committee supported the view of the Cohen Committee that every company should keep a register where the number, description and amount of shares or debentures held by each director and any changes therein are recorded.[2] In 1970, the Van Wyk De Vries Commission recommended that where a director was guilty of insider dealing, other remedies should be available to the company.[3] Also recommended was that insider dealing in listed shares[4] should attract substantial penalties.[5]

These recommendations were adopted into the Company's Act 61 of 1973 but the provision proved ineffective. The Company's Act then enacted section 440B that established The Securities Regulation Panel.[6] The Panel regulates The City Code[7] on takeover and mergers issued by the London Panel on takeovers and mergers.[8] Rule 2.1 of The Code provides that:

> 'secrecy shall be observed before the announcement of a firm's intention to make an offer and that all persons privy to the confidential information, price sensitive information or otherwise, concerning an offer or contemplated offer shall treat that information as secret.'

Moreover, The Code provides that "all persons concerned in an offer or contemplated offer shall conduct themselves so as to minimize the chances of an accidental leak of information." Without any doubt, the provision is crucial for the curtailing of insider trading especially because of the Panel's powers to summon any person whom it believes will be able to furnish information on the subject of an investigation.[9] It[10] also has powers to interrogate such persons under oath. It has been submitted that:

> 'in the absence of The Panel, with its wide powers of subpoena and interrogation, it is unlikely that the provisions relating to insider trading would be effective for the very nature of insider trading renders its detection very problematic and it is extremely doubtful whether the states on their own would have the expertise to police it.'[11]

Still on the development of insider trading regulation in South Africa, the King Task Group[12] was established in 1995 to investigate insider trading. In October 1997, they came up with a final report. As part of their recommendations, The Financial Services Board should be established and saddled with the responsibility of administering the insider trading regulation.[13] The Insider Trading Act 135 of 1998 (ITA) was then enacted and by section 11, the Securities Regulation Panel and the Financial Service Board served as watch dogs of insider trading.

The criminal provisions of the ITA relied on the United Kingdom's Criminal Justice Act of 1993 (CJA) while the civil liability provisions relied on the United States of America's regulation.[14] The ITA however proved inadequate for so many reasons[15] and was repealed by the Securities Services Act 36 of 2004 (SSA).[16] The SSA repealed the Stock Exchange Act of 1985; The Financial Market Control Act 55 of 1989; The Custody and Administration of Securities Act of 1992 and consolidated them into one measure. (It has been argued that what the Securities Services Act did was 'more than a consolidation of the Act.[17] It also amended the repealed laws in many important respects in order to correct and improve some of their provisions. By this means, it added a significant number of new provisions to previous measures).'[18]

In Nigeria, chapter 5, Part XVII of the Companies and Allied Matters Act 1990 focused on insider trading regulation. This part was repealed and re-enacted in Part X of the Investment and Securities Act of 1999 and subsequently Part XI of the Investment and Securities Act of 2007.[19] By Part 2 of the ISA, the Securities and Exchange Commission, being the apex organization of the Nigeria capital market is responsible for investor

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[1] Report of the Commission of Equity on the amendment of Companies Act UG 69 of 1945.
[2] Ibid para 14. Similar to Section 16 of the SEA. The provision was introduced as section 70 Nov into the 1926 Company Act.
[3] Ibid para 44-50.
[4] These shares are usually identical thereby causing the problem of determining the seller and the purchaser in relation to a particular contract of sale of shares. See also Blackman et al, 1 5-394-6.
[5] Ibid para 44-54.
[6] Also known as 'The Panel.'
[7] Also known as 'The Code.'
[8] See the Explanatory note on Securities Regulation Code on Takeover and Mergers.
[9] The Panel seems to be a proper forum where complaints regarding insider trading may be lodged.
[10] The Panel.
[11] R. Jooste; 'Insider Dealing in South Africa- The Criminal Aspects' De Ratione, vol. 4 No. 1 Page 22 Winter 1990.
[12] Chaired by Mervyn E. King.
[13] Final Report by The Kings Task Group into Insider Trading Legislation in October 1997; para 5-8.
[14] Blackman et al Op cit 1 5-394-10.
[15] R. Jooste; 'The Regulation of Insiders Trading in South Africa- Another Attempt' (2000) 117 SALJ.
[16] It came into effect on the 1st of Feb. 2005.
[17] The ITA.
[18] Comment of Rehana Cassim; Lecturer at school of law; University of Witwaterstand Johannesburg. See also the Memorandum on the Objects of the Securities Services Bill, 2004 published as GN 1746 in GG 26684 18th Aug. 2004.
[19] ISA.

Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) DOI: 10.7176/JLPG
Vol.83, 2019

protection; maintenance of fair and orderly securities market; and specifically for the protection of the integrity of the securities market against any abuse arising from the practice of insider trading. Consequently, anyone in possession of material inside information must either disclose it to the investing public or abstain from trading on it.[1] Furthermore, in 2014, the Securities and Exchange Commission approved the amended listing rules of the Nigerian Stock Exchange.[2] This amendment places on all Issuers[3] who wish to have their securities admitted to trading and to remain on the Nigerian Stock Exchange, the duty of ensuring that investors and the public are kept fully informed of all factors which might affect their interest and in particular, that immediate disclosure is made of any information concerning their interest which might reasonably be expected to have material effect on the market activity in, and the prices or value of, listed securities.

From the foregoing, there is no doubt that the legislation is fast developing. Moreover, insider trading is also regulated at the international level. The International Organization of Securities Commission **(IOSCO)** published the Objectives and Principles of Securities Regulation in 1998.[4] Statistics has it that more than 8570 of the world's securities and commodities market regulators are members.[5]

IOSCO highlighted the objectives of good securities market to include:

(a) Investor protection;[6]
(b) Ensuring fair, transparent and effective market; and
(c) Reduction of systemic risks.

CONCLUSION

The provisions of these legislations are seemingly the same, with an ultimate aim to completely eradicate the practice of insider trading. This is to be achieved through the monitoring and controlling of unauthorized use of unpublished price sensitive information by persons who are actively involved in the day-to-day running of a company hence safeguarding the interest of the corporation, investors and the society in general. There is no gainsaying that these legislations have somewhat dealt with some of the challenges of the common law and equitable principles on insider trading.

For instance, the legislations have succeeded in expanding the categories of insiders beyond its limiting scope under the common law. Consequently, by section 57 of the CJA, 'an insider is a person who has access to inside information by him being a director, employee or shareholder of an issuer of securities; or having access to the information by virtue of his employment, office or profession; or the direct or indirect source of his information is a person who is actively involved in the day to day running of a company, hence safeguarding the interest of the corporation, investors and the society in general.'[7] The section accommodates the notion of secondary insiders[8] so that, *any person who is closely connected to a Company enough to have or deal in inside information* is an insider.

Also, unlike under the common law where a director's fiduciary duty is limited to the company,[9] section 16 of the SEA, extends these duties to the shareholders, members and even officers of the company.

Furthermore, dealing is expressly prohibited under the legislation.[10] Consequently, an individual is guilty of insider dealing if he encourages another person to deal in securities that are price-affected securities or he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person[11] or he procures, directly or indirectly, an acquisition or disposal of the securities by any other person.[12]

[1] J.E.O Abugu Op cit Page 241-242.
[2] The Nigerian Stock Exchange, Amendments to the Listing Rules approved by the Securities and Exchange Commission on May 19, 2014.
[3] Any entity, any class of whose securities has been admitted into listing by the Nigerian Stock Exchange.
[4] It was updated in 2003.
[5] Insider trading Wikipedia, free encyclopedia [internet sourced].
[6] 'Investors protection' in this context means the investors should be protected from misleading, manipulative or fraudulent practices which of course includes insiders trading.
[7] Similar provision in section 72 of SSA; section 10b of SEA.
[8] Barry Alexander K. Rider, Yutaka Tajima & Fiona Ma - Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese law 'A Comparative Analysis of Anti-Insider Dealing Legislation' Page 209.
[9] As was decided in Percival vs. Wright Op cit.
[10] The common law had no provision for 'dealing'.
[11] Section 57 of CJA. See section 55 of CJA for the definition of 'dealing' and section 84 of ISA for further prohibition on dealing.
[12] Section 55 (1) (b) of CJA.